

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 VOCALIFE LLC,) (

5 PLAINTIFF,) (CIVIL ACTION NO.

6) (2:19-CV-123-JRG

7 VS.) (MARSHALL, TEXAS

8) (

9 AMAZON.COM, INC. and) (

10 AMAZON.COM LLC,) (OCTOBER 7, 2020

11 DEFENDANTS.) (8:28 A.M.

12 TRANSCRIPT OF JURY TRIAL

13 MORNING SESSION

14 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

15 UNITED STATES CHIEF DISTRICT JUDGE

16
17 FOR THE PLAINTIFF:

18 MR. ALFRED R. FABRICANT
19 MR. PETER LAMBRIANAKOS
20 MR. VINCENT J. RUBINO, III
MS. AMY PARK

21 MR. ENRIQUE ITURRALDE
FABRICANT LLP
230 Park Avenue, 3rd Floor W.
New York, NY 10169

22 MR. SAMUEL F. BAXTER
23 MS. JENNIFER L. TRUELOVE
MCKOOL SMITH, P.C.
24 104 East Houston Street, Suite 300
Marshall, TX 75670
25

1 FOR THE DEFENDANTS:

2 MR. JOSEPH R. RE
ALAN G. LAQUER
3 KENDALL M. LOEBBAKA
JOSHUA J. STOWELL
4 KNOBBE, MARTENS, OLSON & BEAR, LLP
2040 Main Street, Fourteenth Floor
5 Irvine, CA 92614

6 MR. COLIN B. HEIDEMAN
KNOBBE, MARTENS, OLSON & BEAR, LLP
7 925 Fourth Avenue, Suite 2500
Seattle, WA 98104

8 MS. JENNIFER H. DOAN
9 MR. JOSHUA R. THANE
MR. KYLE R. AKIN
10 HALTOM & DOAN
6500 Summerhill Road, Suite 100
11 Texarkana, TX 75503

12 MR. J. DAVID HADDEN
MR. RAVI RANGANATH
13 MR. THOMAS JOHN FOX
FENWICK & WEST LLP
14 801 California Street
Mountain View, CA 94041

15 MR. DERON R. DACUS
16 THE DACUS FIRM, PC
821 ESE Loop 323, Suite 430
17 Tyler, TX 75701

18

19 COURT REPORTER: Shelly Holmes, CSR, TCRR
Official Reporter
20 United States District Court
Eastern District of Texas
21 Marshall Division
100 E. Houston Street
22 Marshall, Texas 75670
(903) 923-7464

23

24 (Proceedings recorded by mechanical stenography, transcript
produced on a CAT system.)

25

P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

Are the parties prepared to read into the record those items from the list of pre-admitted exhibits used during yesterday's portion of the trial?

MS. FABRICANT: Yes, Your Honor.

MR. AKIN: Yes, Your Honor.

THE COURT: All right. Please proceed.

MS. FABRICANT: Good morning, Your Honor.
Samantha Fabricant for Plaintiff Vocalife.

THE COURT: Good morning, please proceed.

MS. FABRICANT: The following exhibits were used on October 6th, 2020, and are being moved into evidence: PTX-96 and PTX-334.

THE COURT: All right. Is there objection to that rendition by the Defendants?

MR. AKIN: No objection.

THE COURT: Do Defendants have a similar rendition to offer into the record?

MR. AKIN: Yes, Your Honor. Kyle Akin on behalf of Amazon. Amazon moves the following exhibits into evidence that were used yesterday, Tuesday, October 6th: DTX-27, DTX-27P, DTX-46, DTX-49P, DTX-54, DTX-55, DTX-71,

08:30:04 1 DTX-181, DTX-342, DTX-491, DTX-809, DTX-1018.

08:30:21 2 MS. FABRICANT: No objection, Your Honor.

08:30:22 3 THE COURT: All right. Without objection from the
08:30:24 4 Defendant [sic], those are noted in the record.

08:30:27 5 We left off yesterday, counsel, with Mr. McGavock
08:30:30 6 on the stand. I believe Plaintiff was about to
08:30:33 7 cross-examine.

08:30:33 8 Mr. Lambrianakos, you may go to the podium and
08:30:37 9 prepare.

08:30:37 10 Are there any binders to distribute with regard to
08:30:42 11 the cross-examination?

08:30:43 12 MR. LAMBRIANAKOS: Yes, Your Honor.

08:30:44 13 THE COURT: Then let's distribute them.

08:30:45 14 Mr. McGavock, if you'd return to the witness
08:30:51 15 stand. I remind you you remain under oath.

08:30:56 16 Let's go off the record for just a minute.

08:31:14 17 (Off-the-record discussion.)

08:31:15 18 THE COURT: All right. We're back on the record.

08:31:23 19 Let's bring in the jury, please.

08:31:25 20 COURT SECURITY OFFICER: All rise.

08:31:26 21 (Jury in.)

08:31:27 22 THE COURT: Good morning, ladies and gentlemen.

08:31:53 23 Thank you for being on time. Please be seated.

08:31:54 24 As you'll recall when we ended the day yesterday,
08:32:00 25 Mr. Dan McGavock was on the witness stand as an expert

08:32:04 1 witness for the Defendants. The direct examination had
08:32:07 2 been completed, and we'll now proceed with
08:32:09 3 cross-examination of the witness by the Plaintiff.

08:32:11 4 You may proceed, Mr. Lambrianakos.

08:32:14 5 MR. LAMBRIANAKOS: Thank you, Your Honor.

08:32:14 6 DANIEL M. MCGAVOCK, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

08:32:14 7 CROSS-EXAMINATION

08:32:15 8 BY MR. LAMBRIANAKOS:

08:32:15 9 Q. Good morning, Mr. McGavock.

08:32:19 10 A. Good morning.

08:32:19 11 Q. You recall that yesterday you gave some testimony
08:32:22 12 regarding the device DEV?

08:32:23 13 A. Yes.

08:32:24 14 Q. You said that DEV was not the correct royalty base
08:32:28 15 because DEV does not account for the losses in the Echo
08:32:32 16 devices themselves, right?

08:32:33 17 A. Yes.

08:32:33 18 Q. You also showed a graphic stating that after the loss
08:32:39 19 on the Echo devices is subtracted from the DEV, the total
08:32:46 20 profit per unit for the Echo devices was about \$2.00 per
08:32:49 21 unit?

08:32:49 22 A. Yes.

08:32:49 23 Q. When you criticized Mr. Ratliff's use of DEV, you
08:32:56 24 referred to DTX-81, right?

08:32:58 25 A. I believe so.

08:32:58 1 MR. LAMBRIANAKOS: Can we put DTX-81 up, please?

08:33:02 2 A. Yes.

08:33:03 3 MR. LAMBRIANAKOS: Can we go to Lines 179 through
08:33:07 4 186?

08:33:09 5 Q. (By Mr. Lambrianakos) This is the portion of the
08:33:14 6 device -- of the document that you referred to, right?

08:33:16 7 A. Yes.

08:33:16 8 Q. You noted that the LTV, which is lifetime value,
08:33:24 9 includes PPU, which is profit per unit, right?

08:33:31 10 A. Correct, on the device.

08:33:32 11 Q. Correct. You'd agree that if the profit per unit is
08:33:36 12 negative, then LTV would take into account the loss on the
08:33:41 13 device, right?

08:33:42 14 A. That's correct. LTV would.

08:33:45 15 Q. And you agree that if Amazon loses a lot of money when
08:33:49 16 it sells an Echo device, that LTV number for an Echo device
08:33:55 17 would be quite low, right?

08:33:56 18 A. It depends. It's a combination of DEV plus PPU.

08:34:03 19 Q. So LTV would at least be less than DEV if the profit
08:34:09 20 per unit is negative, correct?

08:34:10 21 A. Correct.

08:34:11 22 Q. Now, looking at the next number, which is LTV-LF?

08:34:16 23 A. Yes.

08:34:16 24 Q. Is that lifetime value less fixed costs?

08:34:20 25 A. Correct.

08:34:20 1 Q. So LTV-LF takes into account both the loss on the sale
08:34:24 2 of the device, if there is one, and the fixed costs
08:34:27 3 allocated to the device, right?

08:34:29 4 A. That's correct. I'm not sure -- not necessarily
08:34:36 5 allocated. They would be direct-based cost.

08:34:39 6 Q. Yesterday, you mentioned that the DEV of the Echo Dot
08:34:43 7 was \$43.89; do you remember that?

08:34:45 8 A. That sounds familiar.

08:34:50 9 MR. LAMBRIANAKOS: I'd like PTX-1311 up, please.

08:34:54 10 Thank you.

08:34:55 11 Q. (By Mr. Lambrianakos) Do you recall this document
08:34:58 12 yesterday, sir?

08:34:59 13 A. No.

08:35:08 14 Q. Is this one of the documents that was distributed with
08:35:11 15 your testimony?

08:35:11 16 A. I -- I believe so. I think it was in the binder.

08:35:13 17 Q. Do you see that this refers to the program metrics for
08:35:17 18 the -- the Biscuit?

08:35:18 19 A. Yes.

08:35:19 20 Q. And the Biscuit, is that the Echo Dot?

08:35:23 21 A. I believe so.

08:35:30 22 MR. LAMBRIANAKOS: Can we turn to Page Amazon
08:35:36 23 0136362?

08:35:38 24 Q. (By Mr. Lambrianakos) Do you see at this page at the
08:35:43 25 top it refers to program metrics for the Biscuit?

08:35:48 1 A. Yes, yes.

08:35:49 2 Q. And on the right-hand column, it refers to the 49.99
08:35:55 3 MSRP/Target BOM?

08:35:59 4 A. Yes.

08:35:59 5 Q. BOM, that's bill of materials?

08:36:02 6 A. That's my understanding.

08:36:04 7 Q. So that would include the cost of the device elements,
08:36:06 8 the components of it?

08:36:08 9 A. I believe so, yes.

08:36:14 10 Q. Now --

08:36:14 11 A. So 49.99 is the price of the unit. Bill of materials
08:36:20 12 would be the cost.

08:36:21 13 MR. LAMBRIANAKOS: If we go down to Line 45.

08:36:23 14 Q. (By Mr. Lambrianakos) Do you see here it points to the
08:36:29 15 device LTV-LF at the midpoint for DSI?

08:36:34 16 A. Yes.

08:36:35 17 Q. And DSI, that's one of the building blocks of the DEV,
08:36:39 18 right?

08:36:39 19 A. Yes.

08:36:39 20 Q. And it says that the LTV-LF for the Echo Dot at the
08:36:47 21 MSRP of 49.99 with the target BOM is \$54.20. Do you see
08:36:54 22 that?

08:36:54 23 A. Yes.

08:36:54 24 Q. And that number is a little over \$4.00 higher than the
08:36:59 25 DEV of the Echo Dot; is that right?

08:37:01 1 A. It's -- it's an incorrect comparison. The 54.2 is --
08:37:05 2 is in total dollars. It's not a per unit number. If you
08:37:14 3 walk through the document, it's not a per unit number.

08:37:17 4 MR. LAMBRIANAKOS: Your Honor, move to strike that
08:37:19 5 answer as non-responsive.

08:37:20 6 THE COURT: Sustained. The question was: And
08:37:23 7 that number is a little over \$4.00 higher. That's not the
08:37:27 8 answer you gave at all, Mr. McGavock. You need to limit
08:37:31 9 your answers to the questions asked.

08:37:32 10 As you know, Mr. Dacus will get a chance to ask
08:37:36 11 follow-up questions once Mr. Lambrianakos is finished with
08:37:39 12 his examination.

08:37:41 13 THE WITNESS: Thank you.

08:37:41 14 THE COURT: All right. Restate your question or
08:37:43 15 move on, counsel.

08:37:44 16 Q. (By Mr. Lambrianakos) So you agree that the LTV-LF for
08:37:48 17 this -- for the Echo Dot at 49.99 MSRP and the target BOM
08:37:55 18 is \$54.20 -- is \$4.23 higher than the DEV of the Echo Dot?

08:38:01 19 A. No.

08:38:09 20 Q. Yesterday you criticized the use of DEV because it
08:38:14 21 includes sales of non-patented products, such as dog food
08:38:16 22 and barbecue utensils?

08:38:19 23 A. Yes.

08:38:19 24 Q. You testified yesterday that you used merchandise sales
08:38:20 25 figures for the Echo devices as your starting point for a

08:38:22 1 reasonable royalty, right?

08:38:24 2 A. Yes, physical product sales.

08:38:28 3 Q. Do those physical product sales potentially include

08:38:31 4 things like dog food and barbecue utensils?

08:38:34 5 A. Yes, that's my understanding.

08:38:36 6 Q. You also said the DEV metric that Mr. Ratliff relied on

08:38:41 7 includes sales from devices other than Echo products,

08:38:44 8 right?

08:38:44 9 A. Yes.

08:38:45 10 Q. You didn't show the jury any documents to support that

08:38:48 11 testimony, did you?

08:38:50 12 A. I don't recall.

08:38:52 13 Q. You didn't cite -- you didn't cite any deposition

08:38:55 14 testimony from any Amazon witness to support that, did you?

08:38:57 15 A. To support what?

08:38:59 16 Q. To support your statement that the DEV metric includes

08:39:04 17 sales from devices other than Echo products?

08:39:06 18 A. It's in my -- in detail in my expert report. It --

08:39:11 19 it's based on discussions I had with Amazon personnel.

08:39:16 20 It's my understanding of how DEV is computed. So I think

08:39:20 21 it's inherent in all the documents I reviewed and the work

08:39:23 22 I did.

08:39:23 23 MR. LAMBRIANAKOS: Move to strike that answer as

08:39:25 24 non-responsive, Your Honor.

08:39:26 25 THE COURT: Overruled.

08:39:33 1 Q. (By Mr. Lambrianakos) You didn't cite to any testimony
08:39:37 2 from a deposition during your testimony yesterday that
08:39:39 3 supports your proposition that the DEV metric that
08:39:42 4 Mr. Ratliff relies on includes sales from devices other
08:39:45 5 than Echo products, did you?

08:39:46 6 A. No, I didn't need to. It's clear in the documents.

08:39:49 7 Q. But you didn't cite to any documents during your
08:39:53 8 testimony yesterday that supported that proposition, did
08:39:54 9 you?

08:39:55 10 A. That's correct.

08:39:57 11 Q. You testified about the Echo Tap yesterday?

08:40:01 12 A. Yes.

08:40:01 13 Q. You testified that the Echo Tap was a good point of
08:40:04 14 comparison to the accused products, even though it had only
08:40:06 15 one microphone?

08:40:07 16 A. Yes.

08:40:07 17 Q. When you testified about that, you didn't mention that
08:40:12 18 the word "error rate" on the Tap device was between 5 and 9
08:40:18 19 percent higher on the Tap than on devices with seven
08:40:21 20 microphones, correct?

08:40:22 21 A. Correct.

08:40:22 22 Q. Now, the word "error rate" goes to mistakes that the
08:40:26 23 product makes when understanding the user's speech, right?

08:40:29 24 A. That's my understanding.

08:40:30 25 Q. You didn't mention that the Tap was discontinued in

08:40:33 1 2018 after only about a year and a half of sales, right?

08:40:37 2 A. It sold for about \$70 million in sales during those two
08:40:40 3 years.

08:40:41 4 Q. So you didn't mention that the Tap was discontinued
08:40:44 5 after only one and a half years of sales, correct?

08:40:46 6 A. No, but it was sold during the entire DEV period that
08:40:50 7 Mr. Ratliff relies upon. So during that period, it was one
08:40:53 8 of the top sellers. It was 70 million in sales.

08:40:58 9 Q. The Amazon Tap had 70 million in sales; that's your
08:41:02 10 testimony?

08:41:02 11 A. Yes.

08:41:02 12 Q. So you disagree with the proposition that during the
08:41:05 13 2017 to 2018 time frame for which Amazon provided DEV
08:41:08 14 figures, there were only about 256,000 Amazon Taps sold?

08:41:12 15 A. I think there were two -- that sounds about right. I
08:41:15 16 think overall there were 700,000 Amazon Tap units sold.

08:41:19 17 Q. Yesterday, you testified that the Google offer was
08:41:25 18 relevant to the hypothetical negotiation in this case?

08:41:28 19 A. Yes.

08:41:28 20 Q. And as part of your discussion of the -- the
08:41:34 21 Georgia-Pacific factors, you said that Factor No. 7 weighed
08:41:39 22 in favor of Vocalife, right?

08:41:44 23 A. Yes, I believe so.

08:41:45 24 Q. And that is the factor that goes to the duration of the
08:41:48 25 patent?

08:41:49 1 A. I believe so.

08:41:54 2 Q. What's your understanding of the expiration date of the
08:41:57 3 patent in this case?

08:41:58 4 A. 2031.

08:41:59 5 Q. Now, the hypothetical negotiation looks at what a
08:42:03 6 willing licensor and licensee would have agreed to, to
08:42:07 7 license the patent-in-suit; isn't that right?

08:42:09 8 A. That's correct.

08:42:10 9 Q. So you must have a willing licensor and licensee to
08:42:13 10 begin with, correct?

08:42:14 11 A. Correct.

08:42:14 12 Q. The licensor is the one who owns the patent, right?

08:42:18 13 A. Yes.

08:42:18 14 Q. The licensee is the one who wants to license the
08:42:22 15 patent?

08:42:22 16 A. Correct.

08:42:23 17 Q. The licensee wants to license the patent so he can
08:42:24 18 manufacture and sell a product that uses the patented
08:42:25 19 invention, right?

08:42:26 20 A. That could be one reason.

08:42:30 21 Q. Now, when you discuss the standard for Georgia-Pacific
08:42:33 22 15 in your report, you said that the licensee seeks to
08:42:37 23 license the product so that he can manufacture and sell the
08:42:40 24 product that uses the patented invention, didn't you?

08:42:42 25 A. I'd have to refer to my report, but that sounds fair to

08:42:48 1 me.

08:42:48 2 Q. So you'd agree that in the hypothetical negotiation,
08:42:54 3 they seek to settle on an amount which a prudent licensee
08:42:58 4 who desired as a business proposition to obtain a license
08:43:01 5 to manufacture and sell a particular article embodying the
08:43:06 6 patented invention, would have been willing to pay as a
08:43:08 7 royalty. Do you remember that?

08:43:10 8 A. Yes. That's part of Georgia-Pacific 15.

08:43:13 9 Q. So you agree that the licensee is licensing the patent
08:43:17 10 in order to manufacture and sell the product, right?

08:43:21 11 A. Well, in this case, the licensee is the -- Amazon is
08:43:28 12 licensing for the right to use the '049 patent.

08:43:34 13 Q. Now, both the licensor and licensee in this
08:43:40 14 hypothetical negotiation have to believe that the patent is
08:43:42 15 valid, right?

08:43:43 16 A. Correct, that's an assumption.

08:43:45 17 Q. And it's required as an assumption in the hypothetical
08:43:48 18 negotiation that both parties agree that the patent is
08:43:50 19 infringed, right?

08:43:51 20 A. That's correct, that's an assumption.

08:43:55 21 Q. And in the hypothetical negotiation, the assumption is
08:43:58 22 that the licensee knows that he has to license the patent
08:44:01 23 because his activities infringe the patent, right?

08:44:04 24 A. It's an assumption that the accused products or methods
08:44:12 25 would be covered by the -- the patent-in-suit, so it's an

08:44:15 1 assumption.

08:44:16 2 Q. You understand that the Google offer that you mentioned
08:44:18 3 yesterday was made in 2015, right?

08:44:20 4 A. Yes.

08:44:20 5 Q. And that offer was made with respect to the '756
08:44:24 6 patent, right?

08:44:24 7 A. Correct. The original patent that led to the reissued
08:44:29 8 '049 patent.

08:44:29 9 Q. You believe that this offer is relevant to the
08:44:31 10 hypothetical negotiation that would occur between Dr. Li
08:44:33 11 and Amazon?

08:44:34 12 A. Yes.

08:44:35 13 Q. And the hypothetical negotiation with Amazon would have
08:44:39 14 taken place three years later, in 2018, right?

08:44:42 15 A. Correct. Any time up to that date.

08:44:45 16 Q. And at that negotiation, the '049 patent would have
08:44:49 17 been discussed, right?

08:44:50 18 A. That's correct.

08:44:51 19 Q. Now, on your report, you didn't analyze the differences
08:44:54 20 between the '049 patent and the '756 patent, did you?

08:44:58 21 A. I did. I did analyze. I reviewed both patents in
08:45:05 22 connection with preparing my report.

08:45:06 23 Q. And, in your report, the text of the report, you -- it
08:45:10 24 contains no analysis about the difference between the
08:45:13 25 patent claims that would have affected the relative value

08:45:15 1 of the '756 patent versus the '049 patent, right?

08:45:18 2 A. I didn't do a claim-by-claim analysis, but I read both
08:45:21 3 patents, and they're nearly identical.

08:45:23 4 Q. And nothing in your report indicates what the results
08:45:27 5 of your analysis was in terms of the claims of those
08:45:29 6 patents, right?

08:45:30 7 A. Not in terms of the claims but in terms of what I
08:45:32 8 understood Dr. Li to believe his invention covered, and
08:45:36 9 it's basically the same thing between the two patents.

08:45:38 10 Q. And you didn't cite to any evidence of what Dr. Li
08:45:44 11 thought his patent covered, in your report, did you?

08:45:47 12 A. Yes, I did.

08:45:48 13 Q. You didn't cite to any testimony of Dr. Li in which he
08:45:48 14 explained the differences between the '756 patent claims
08:45:53 15 and the '049 patent claims, did you?

08:45:53 16 A. His patents explicitly explained what he believed his
08:45:57 17 invention to cover. That's what he represented to the U.S.
08:46:00 18 Patent and Trademark Office.

08:46:00 19 Q. And in your report itself, it contains no written
08:46:03 20 explanation or analysis of what the differences were
08:46:05 21 between the claims of the '756 patent and the claims of the
08:46:10 22 '049 patent; isn't that true, sir?

08:46:11 23 A. No, I didn't do a claim-by-claim analysis. I looked at
08:46:14 24 it from a valuation perspective. From a valuation
08:46:19 25 perspective, they're identical, particularly in terms of

08:46:23 1 what he viewed the market to be for his technology.

08:46:28 2 Q. So you believe that two patents that have different
08:46:30 3 claims and different claim scope had exactly the same
08:46:33 4 value; is that your testimony?

08:46:34 5 A. Not exactly. But I didn't do a claim-by-claim
08:46:37 6 analysis. But it's my understanding that the -- there are
08:46:41 7 very minor differences. But that's outside of my area of
08:46:44 8 expertise.

08:46:45 9 Q. And nowhere in your report did you account for the
08:46:49 10 differences, that you just admitted there are, between the
08:46:53 11 '756 patent claims and the '049 patent claims, right?

08:46:56 12 A. Well, I did in my report cite Dr. Kiaei, and I
08:47:00 13 understand that he concluded that ultimately there were
08:47:02 14 some claims narrowed in the '049 patent. So I -- in my
08:47:08 15 view, the patents cover the same thing from a valuation
08:47:12 16 standpoint.

08:47:12 17 Q. So when that --

08:47:14 18 A. I believe Dr. Li was intending to broaden his claims of
08:47:17 19 the '049 patent, but I think ultimately that didn't occur.
08:47:21 20 So I think it's a very strong benchmark for -- for the
08:47:24 21 hypothetical negotiation.

08:47:25 22 Q. So you think that you can compare the value of the '756
08:47:30 23 patent to the '049 patent without having any understanding
08:47:34 24 or any analysis written in your report that discusses the
08:47:37 25 differences in the patent scope, right?

08:47:39 1 A. Well, I did mention in my report that it's my
08:47:42 2 understanding the claims ultimately were narrowed, and I
08:47:47 3 discussed the other elements of the patents that were very
08:47:49 4 similar --

08:47:50 5 Q. So if it's true --

08:47:52 6 A. -- which is pretty much the entire -- the entire
08:47:55 7 patents. If you look at the -- the abstract, the claims
08:47:59 8 themselves, the background of the invention, they're
08:48:03 9 identical.

08:48:03 10 Q. So tell us, what was the narrowing amendment in the
08:48:09 11 '049 patent?

08:48:09 12 A. I don't know.

08:48:11 13 Q. So you understand it was narrowed because you were told
08:48:14 14 that it was narrowed?

08:48:14 15 A. Yes, I -- I rely on technical experts for those sorts
08:48:18 16 of opinions.

08:48:19 17 Q. And you think that a narrower claim has the same value
08:48:22 18 as the claim that was -- that preceded it?

08:48:24 19 A. No, theoretically, it would have a downward adjustment,
08:48:28 20 but I didn't make any downward adjustment. So I -- I -- I
08:48:31 21 mentioned in my report, and I understood that the claims
08:48:33 22 were -- some claims may have been ultimately narrowed, but
08:48:37 23 I did not make the downward adjustment. So in that regard,
08:48:40 24 I conservatively kept -- kept the number the same.

08:48:44 25 Q. And if you're wrong that the claim was narrowed, if the

08:48:48 1 claim was, in fact, broadened, then your analysis would be
08:48:52 2 incorrect, wouldn't it?

08:48:53 3 A. I don't believe, so because there are -- there are many
08:48:55 4 other reasons as to why that number is high. There are
08:48:58 5 many other factors. It -- it transfers title to the
08:49:03 6 patented invention, which is much broader than the
08:49:09 7 non-exclusive license in the hypothetical negotiation.

08:49:11 8 Q. So you agree, then, that in your report, you did not
08:49:18 9 make an adjustment to the value of the '049 patent versus
08:49:21 10 the '756 patent based on your understanding of the scope of
08:49:26 11 the claims of the '049 patent relative to the '756 patent?

08:49:30 12 A. That's correct, and I didn't make the other adjustments
08:49:32 13 that we -- suggest a lower number than \$700,000.00.

08:49:42 14 Q. Now, you're aware that the '756 patent was surrendered
08:49:45 15 to the Patent Office, correct?

08:49:46 16 A. That's my understanding.

08:49:47 17 Q. And it was replaced with the '049 patent?

08:49:49 18 A. The '049 is the reissue patent, correct.

08:49:51 19 Q. And you didn't adjust in your royalty analysis for the
08:49:54 20 fact that the '756 patent was surrendered by Dr. Li, right?

08:49:57 21 A. It doesn't -- that doesn't require an adjustment.

08:50:00 22 Q. You don't think it matters that that '756 patent was
08:50:03 23 willingly surrendered to the Patent Office in order to
08:50:06 24 obtain the '049 patent?

08:50:07 25 A. No. At the time Dr. Li made the offer, he assumed his

08:50:17 1 patent was valid.

08:50:17 2 THE COURT: Mr. McGavock, you answered no. That's
08:50:21 3 a complete answer to the question. I'm going to remind you
08:50:23 4 again, limit your answers to the questions asked, sir. Do
08:50:27 5 you understand?

08:50:27 6 THE WITNESS: Yes. Thank you.

08:50:28 7 THE COURT: Will you do that?

08:50:29 8 THE WITNESS: Yes.

08:50:30 9 THE COURT: Let's proceed, counsel.

08:50:33 10 Q. (By Mr. Lambrianakos) In order to have a valid
08:50:36 11 hypothetical negotiation, both parties have to believe that
08:50:38 12 the patent is infringed, correct?

08:50:40 13 A. Yes, that's the assumption.

08:50:41 14 Q. You've presented no evidence that Google was infringing
08:50:44 15 the '756 patent in 2015 when the offer was made, correct?

08:50:46 16 A. That's correct.

08:50:46 17 Q. Google did not have a voice assisted smart-speaker in
08:50:50 18 2015, did it?

08:50:51 19 A. No.

08:50:52 20 Q. Dr. Li knew that Google was not infringing in 2015,
08:50:56 21 right?

08:50:56 22 A. I don't know that.

08:50:58 23 Q. So you're not aware of whether the potential patent
08:51:03 24 owner/licensor knew of the infringement of the licensee at
08:51:09 25 the time that the offer was made, which you believe is

08:51:11 1 relevant to the hypothetical negotiation, correct?

08:51:12 2 A. No, I only knew what I read in the patent, which

08:51:16 3 suggested that this patent would cover many things that

08:51:19 4 Google was doing at the time.

08:51:20 5 Q. Your analysis of the patent was it would cover things

08:51:27 6 that Google was doing at the time; is that what you said?

08:51:30 7 A. Yeah. Particular -- their position in the smartphone

08:51:33 8 market with the Android operating system.

08:51:38 9 Q. So what evidence did you have of adaptive beamforming

08:51:40 10 being performed by Google in 2015?

08:51:43 11 A. Nothing specific to Google. But, in 2012, Apple

08:51:46 12 announced the iPhone 5, which included beamforming and

08:51:53 13 noise cancellation technology in their -- in their iPhone.

08:51:56 14 And they're a direct competitor with Google in that space.

08:51:56 15 Q. So if Apple was using adaptive beamforming in 2012 or

08:52:02 16 it was using some kind of sound technology in 2012, that

08:52:05 17 led you to believe that Google was infringing in 2015?

08:52:10 18 A. No. It would just suggest there's value to the

08:52:12 19 invention -- to Google's business model.

08:52:15 20 Q. Now, the hypothetical negotiation doesn't ask whether

08:52:20 21 the licensee believes the patent has value to its business

08:52:23 22 model; it asks whether it needs to license the patent in

08:52:28 23 order to practice that patent -- that patent to manufacture

08:52:30 24 and sell the product. Right?

08:52:31 25 A. Generally speaking, yes, but it's a -- it's a valuation

08:52:35 1 question. We're trying to value the patent.

08:52:37 2 Q. And you're trying to value the patent based on the
08:52:40 3 licensee's need to license it to avoid patent infringement;
08:52:40 4 isn't that right?

08:52:45 5 A. Well, the -- the hypothetical negotiation assumes the
08:52:47 6 patent is valid and infringed.

08:52:49 7 Q. And you agree that in 2015, Google wasn't infringing?

08:52:54 8 A. I would generally agree with that. I don't know for
08:52:59 9 sure.

08:53:00 10 Q. In 2018, at the time the hypothetical negotiation took
08:53:09 11 place, we assume that Amazon's sales of millions of Echo
08:53:14 12 products per year infringe, right?

08:53:18 13 A. Can you repeat the question?

08:53:19 14 Q. By 2018, at the time of the hypothetical negotiation,
08:53:23 15 we assume that Amazon's sales of millions of Echo products
08:53:27 16 per year infringe, right?

08:53:29 17 A. Yes.

08:53:30 18 Q. And we assume Dr. Li knew Amazon was selling millions
08:53:33 19 of infringing products per year, right?

08:53:37 20 A. Dr. Li was not selling million -- millions of units of
08:53:42 21 products.

08:53:42 22 Q. Excuse me. We assume that Dr. Li knew that Amazon was
08:53:45 23 selling millions of infringing units per year, right?

08:53:51 24 A. Yes.

08:53:51 25 Q. And that Amazon knew that it needed a license?

08:53:54 1 A. The assumption is that they would need a license to
08:53:56 2 practice the patented invention.

08:53:57 3 Q. Now back to the Google offer. You presented no
08:54:00 4 evidence in your report that Dr. Li believed that the '756
08:54:03 5 patent was valid, right?

08:54:04 6 A. No.

08:54:07 7 Q. And you did -- you have no information about what
08:54:11 8 Google believed about the value of the '75 -- the
08:54:15 9 validity -- strike that.

08:54:16 10 And you had no information about what Google
08:54:18 11 believed about the validity of the '756 patent, right?

08:54:20 12 A. That's correct.

08:54:20 13 Q. So sitting here today, for all you know, Google
08:54:23 14 believed the '756 patent was invalid, right?

08:54:24 15 A. That's possible.

08:54:25 16 Q. And, for all you know, Dr. Li believed the same thing,
08:54:25 17 don't you?

08:54:29 18 A. I doubt that.

08:54:31 19 Q. Sitting here today, you -- you believe you have
08:54:34 20 information about what Dr. Li believed in 2015?

08:54:37 21 A. I can't imagine an owner of a company who's involved
08:54:42 22 with licensing would make an offer --

08:54:45 23 THE COURT: Mr. McGavock, he didn't ask you to
08:54:47 24 speculate. He asked you if you had information about
08:54:49 25 Dr. Li's state of mind. Now, answer the question.

08:54:51 1 THE WITNESS: Thank you.

08:54:52 2 A. Can you repeat the question?

08:54:55 3 Q. (By Mr. Lambrianakos) You have no information, sitting
08:54:56 4 here today, about whether Dr. Li believed that the '756
08:55:00 5 patent was valid?

08:55:02 6 A. That's generally correct.

08:55:06 7 Q. You didn't present any -- any evidence in your direct
08:55:10 8 testimony that Google believed that the '756 patent was
08:55:12 9 valid, right?

08:55:13 10 A. That's correct.

08:55:13 11 Q. The hypothetical negotiation assumes a negotiation
08:55:21 12 between a willing licensor and licensee, right?

08:55:24 13 A. That's correct.

08:55:24 14 Q. The Google offer did not result in a negotiation, did
08:55:28 15 it?

08:55:29 16 A. No.

08:55:29 17 Q. Now, you're aware of Dr. Li's testimony that he didn't
08:55:34 18 understand the Google offer to be an offer to sell all of
08:55:36 19 his rights in the '756 patent, right?

08:55:41 20 A. That was his testimony.

08:55:43 21 Q. And the hypothetical negotiation assumes that the
08:55:46 22 parties understand the terms of the deal that they're
08:55:48 23 negotiating, doesn't it?

08:55:49 24 A. Yes.

08:55:55 25 Q. Regarding the Google patent purchase promotion, that

08:55:59 1 program lasted for about two months, right?

08:56:01 2 A. Yes.

08:56:01 3 Q. You reviewed the documents described in the program,
08:56:06 4 right?

08:56:06 5 A. Yes.

08:56:06 6 Q. And you're familiar with the terms of the PPP?

08:56:09 7 A. Yes.

08:56:10 8 Q. And you know why Google started the promotion, right?

08:56:13 9 A. Not the specifics, but it was a publicly known program.

08:56:20 10 Q. And so you're familiar with the reasons that Google set
08:56:22 11 forth for the program, right?

08:56:24 12 A. I recall reading some of the reasons, yes.

08:56:26 13 Q. Google didn't say that the purpose of the patent
08:56:29 14 purchase promotion was to buy patents covering technology
08:56:33 15 that its products were using, right?

08:56:35 16 A. I don't -- I don't recall the specific language, but
08:56:38 17 they were looking to buy any patents that would be relevant
08:56:40 18 to their -- to their business.

08:56:42 19 Q. So you don't recall one way or another whether Google
08:56:46 20 said that the purpose of the patent purchase promotion was
08:56:49 21 to buy patents covering technology that its products were
08:56:52 22 using?

08:56:53 23 A. Well, I think they were looking to buy any patents that
08:56:56 24 might be relevant to their -- their general space, Google's
08:56:59 25 general business space.

08:57:00 1 Q. So did Google specifically say in its documents that
08:57:07 2 the reason it was going to purchase patents or was looking
08:57:10 3 to buy patents through this promotion was to obtain patents
08:57:13 4 that cover the products that it was using at the time?

08:57:15 5 A. I don't recall seeing anything that specific.

08:57:19 6 Q. Do you recall seeing documents and studying documents
08:57:21 7 so that you could fully understand the terms of the patent
08:57:24 8 purchase promotion?

08:57:26 9 A. Yes.

08:57:26 10 Q. And yet that would be important for you to speculate --
08:57:29 11 excuse me -- withdraw that.

08:57:30 12 That would be important for you to be able to
08:57:33 13 provide an opinion about whether the Google offer was
08:57:35 14 relevant to the hypothetical negotiation?

08:57:37 15 A. Yes.

08:57:38 16 Q. And if the Google documents said that Google was buying
08:57:42 17 patents that it believed would cover its activities at the
08:57:45 18 time, that would be an important piece of proof for you in
08:57:47 19 your hypothetical negotiation analysis, right?

08:57:49 20 A. I don't think it would make a difference in my ultimate
08:57:53 21 opinion, based on the -- the nature of the program. They
08:57:57 22 were open to buy any -- any patents.

08:57:59 23 Q. The nature of the program, you mentioned, right?

08:58:03 24 A. Yes.

08:58:04 25 Q. Didn't Google say that the patent purchase promotion

08:58:07 1 was just an experiment?

08:58:08 2 A. Yes.

08:58:08 3 Q. And you're basing your hypothetical negotiation in a
08:58:12 4 real-life patent case, on an experiment, isn't that right,
08:58:17 5 sir?

08:58:17 6 A. The natural offer to a large tech company, which they
08:58:20 7 refer to in some documents as an experiment.

08:58:22 8 Q. So you agree, then, that the patent purchase promotion
08:58:25 9 was just an experiment, right?

08:58:26 10 A. That's what they referred to it, but they ended up
08:58:29 11 acquiring thousands of patents.

08:58:35 12 MR. LAMBRIANAKOS: No further questions. I pass
08:58:37 13 the witness.

08:58:37 14 THE COURT: You pass the witness?

08:58:40 15 Is there redirect, Mr. Dacus?

08:58:44 16 MR. DACUS: Yes, Your Honor, please.

08:58:47 17 THE COURT: You may proceed.

08:58:49 18 MR. DACUS: Mr. Berk, may we pull up PTX-1311,
08:58:58 19 please, sir? And can you go to the Bates stamp number
08:59:17 20 ending in 362, please?

08:59:17 21 REDIRECT EXAMINATION

08:59:20 22 BY MR. DACUS:

08:59:20 23 Q. Mr. McGavock, you remember this is the Amazon document
08:59:31 24 that Mr. Lambrianakos was just asking you about as it
08:59:34 25 related to the DEV calculation, correct?

08:59:36 1 A. Yes.

08:59:36 2 Q. And you remember, sir, that during Mr. Ratliff's
08:59:38 3 testimony on behalf of Vocalife, he agreed that the
08:59:45 4 calculation for the determination of a royalty should
08:59:50 5 include the loss on the sale of the actual Echo device,
08:59:54 6 correct?

08:59:54 7 A. That's correct.

08:59:55 8 Q. He -- he believed his DEV calculation included it; you
08:59:59 9 remember that?

08:59:59 10 A. Yes.

09:00:00 11 Q. You disagree with that, correct?

09:00:02 12 A. Correct.

09:00:02 13 Q. And if I understood Mr. Lambrianakos, he was attempting
09:00:07 14 to use this document to show that, in fact, the lifetime
09:00:13 15 value of an Echo device per unit was -- was not a loss.
09:00:17 16 And so that's what I want to talk to you about. Is that
09:00:20 17 okay?

09:00:21 18 A. Yes.

09:00:23 19 MR. DACUS: So if you go to Line 28, Mr. Berk, can
09:00:27 20 you highlight Line 28?

09:00:29 21 Q. (By Mr. Dacus) What does that say, sir, on Line 28?

09:00:32 22 A. Total program financials in millions.

09:00:36 23 Q. And is that parentheses where it says "in millions," is
09:00:43 24 that an important point for reading this Amazon document?

09:00:46 25 A. Yes.

09:00:46 1 MR. DACUS: Okay. If you'll go back out,

09:00:49 2 Mr. Berk. And if you will highlight Line 45, please.

09:00:57 3 Q. (By Mr. Dacus) This is the line that Mr. Lambrianakos

09:00:59 4 was trying to get you to agree that that 54.2 was \$54.20

09:01:08 5 per device. Do you remember that question?

09:01:10 6 A. Yes.

09:01:10 7 Q. Do you agree with that?

09:01:12 8 A. No.

09:01:12 9 Q. Why not?

09:01:13 10 A. Because it's -- it's clear from the document that that

09:01:16 11 number represents 54 million dollars -- 200,000.00 dollars,

09:01:22 12 so 54.2 million.

09:01:24 13 Q. So to the extent that Mr. Lambrianakos was attempting

09:01:28 14 to leave this jury with the impression that that 54.2 is a

09:01:32 15 per unit number; is that accurate or inaccurate?

09:01:35 16 A. It's inaccurate.

09:01:37 17 Q. Okay.

09:01:37 18 MR. DACUS: If you'll pull that down, Mr. Berk,

09:01:40 19 not the document -- just the highlighted portion. If

09:01:45 20 you'll go up to I think it's Line 6, please, sir.

09:01:50 21 Q. (By Mr. Dacus) Now, do you see what Line 6 says, sir?

09:01:53 22 A. Yes.

09:01:53 23 Q. What does it say?

09:01:54 24 A. Per unit economics.

09:01:56 25 Q. So this document indeed does include per unit

09:01:59 1 information that Mr. Lambrianakos was attempting to convey
09:02:02 2 to the jury, correct?

09:02:03 3 A. Yes.

09:02:03 4 MR. DACUS: If you'll pull that down, Mr. Berk,
09:02:05 5 not the document but just the highlighted portion. And if
09:02:08 6 you will highlight Line 23, please.

09:02:17 7 Q. (By Mr. Dacus) Do you see what Line 23 says with
09:02:19 8 respect to a per unit long-term value for an Echo, sir?

09:02:23 9 A. Yes.

09:02:23 10 Q. What does it say?

09:02:24 11 A. That it's between negative \$10.00 per unit and negative
09:02:29 12 \$6.00 per unit.

09:02:30 13 Q. How do you know it's negative?

09:02:32 14 A. Because of the -- the brackets.

09:02:34 15 Q. So those brackets indicate to financial people that
09:02:38 16 that's actually a negative rather than a positive?

09:02:40 17 A. Yes.

09:02:41 18 Q. So rather than, as Mr. Lambrianakos said, the per unit
09:02:47 19 profit being \$54.20, it is instead actually a \$10.00 loss?

09:02:52 20 A. That's correct.

09:02:53 21 Q. Does that support what you told the jury yesterday
09:02:56 22 afternoon?

09:02:56 23 A. Yes.

09:02:57 24 MR. DACUS: We can pull that down, Mr. Berk.

09:03:04 25 Q. (By Mr. Dacus) As a general proposition, sir, are you

09:03:06 1 confident that this DEV, downstream economic value, DEV
09:03:11 2 that Mr. Ratliff used, does not include the loss per unit?
09:03:15 3 A. Yes, I'm a hundred percent confident he does not
09:03:19 4 include the loss per unit.
09:03:20 5 Q. And as support for that, have you interviewed employees
09:03:23 6 at Amazon?
09:03:23 7 A. Yes.
09:03:24 8 Q. Multiple ones?
09:03:25 9 A. Multiple employees, including the financial analyst or
09:03:30 10 economist that actually prepared the DEV document that
09:03:34 11 Mr. Ratliff relied upon.
09:03:35 12 Q. Did you hear Mr. Prasad's testimony from Amazon here
09:03:39 13 where he said that the DEV, downstream economic value, does
09:03:42 14 not include the loss per Echo unit?
09:03:45 15 A. Yes.
09:03:46 16 Q. And we -- you also reviewed DTX-81, which is the
09:03:49 17 definitions that Amazon uses, including for DEV, correct?
09:03:54 18 A. That's correct.
09:03:54 19 Q. All -- all of that information leads you to conclude
09:03:57 20 that DEV does not include the loss per unit?
09:04:00 21 A. Yes.
09:04:01 22 Q. With respect to this Google offer that Dr. Li made, is
09:04:12 23 it still your opinion that this \$700,000.00 number is a
09:04:16 24 significant data point that this jury should consider if
09:04:19 25 they get to the issue of damages?

09:04:21 1 A. Yes.

09:04:22 2 Q. And is it your conclusion, sir, that, although that
09:04:24 3 offer related to the '756 patent, that the '756 and the
09:04:31 4 '049 that's at issue here are similar such that, just like
09:04:36 5 if you're house shopping, the jury should consider the
09:04:40 6 \$700,000.00 offer?

09:04:42 7 A. Yes.

09:04:43 8 Q. And we talked about this house-shopping analogy
09:04:50 9 yesterday. Is that applicable to the comparison of the
09:04:54 10 '756 and the '049? And, if so, how? Can you tell the
09:04:57 11 jury?

09:04:57 12 A. Yes. It's very similar houses in the same
09:05:04 13 neighborhood. They have basically the same number of
09:05:07 14 rooms. So the two patents are nearly identical. It covers
09:05:10 15 the same -- the same broad invention concept.

09:05:14 16 Q. The -- in your financial world, generally would people
09:05:22 17 pay more to buy a patent than they would to simply license
09:05:25 18 it?

09:05:25 19 A. Yes.

09:05:30 20 Q. So --

09:05:30 21 A. Absolutely.

09:05:31 22 Q. So this -- this jury is here to determine only what
09:05:35 23 Amazon should pay to license the patent, correct?

09:05:39 24 A. That's correct.

09:05:40 25 Q. Dr. Li's offer to Google was actually to sell the

09:05:43 1 entirety of the patent, correct?

09:05:44 2 A. Yes, it was to sell, transfer title, and the license
09:05:49 3 would simply just be, as Mr. Ratliff suggested, a rental --
09:05:53 4 a rental payment for use.

09:05:55 5 Q. So when Mr. Lambrianakos was asking you if you made any
09:05:59 6 adjustments and you said no, were you to make adjustments
09:06:02 7 to that \$700,000.00, you would actually need to lower it;
09:06:10 8 is that correct?

09:06:10 9 A. That's correct.

09:06:10 10 Q. In other words, if we were looking at a pure license
09:06:12 11 like this jury is going to determine, you would actually
09:06:15 12 need to lower that \$700,000.00 number; is that fair?

09:06:20 13 A. Yes.

09:06:20 14 Q. Now, do you remember the questions from
09:06:21 15 Mr. Lambrianakos about whether or not Dr. Li knew what he
09:06:27 16 was doing when he was making this offer to Google?

09:06:29 17 A. Yes.

09:06:29 18 Q. I think you said you've seen some evidence to indicate
09:06:34 19 that he knew exactly what he was doing in selling the
09:06:36 20 patent, correct?

09:06:37 21 A. Yes.

09:06:38 22 MR. DACUS: Ms. Lockhart, may I have the document
09:06:41 23 camera, please?

09:06:43 24 Q. (By Mr. Dacus) I'm going to show you what's previously
09:06:55 25 marked in this case as DTX-1.

09:06:59 1 Do you remember seeing this document, sir?

09:07:01 2 A. Yes.

09:07:01 3 Q. And this is Dr. Li's offer to Google to sell the
09:07:10 4 patent, correct?

09:07:11 5 A. Correct.

09:07:12 6 Q. And there's a part of this that we haven't talked about
09:07:15 7 specifically.

09:07:16 8 Do you see right here what Dr. Li said when he
09:07:20 9 submitted this form? And, if so, can you tell the jury
09:07:23 10 what he said?

09:07:23 11 A. He -- he said he accepted -- or the word is "accept."

09:07:31 12 Q. Okay.

09:07:31 13 A. And there are specific terms that he accepted.

09:07:35 14 Q. Okay. So the specific terms that Dr. Li accepted, I'm
09:07:47 15 going to show you here.

09:07:48 16 Have you -- have you seen this document before,
09:07:52 17 sir, entitled: Patent Offer Submission?

09:07:55 18 A. Yes.

09:07:55 19 Q. You've seen that in the course of your work in this
09:07:58 20 lawsuit?

09:07:58 21 A. Yes.

09:07:58 22 Q. And if we go down here to Paragraph 6, is it your
09:08:05 23 understanding, sir, that -- that these are the terms that
09:08:08 24 Dr. Li was accepting when he submitted this offer to
09:08:11 25 Google?

09:08:11 1 A. Yes.

09:08:12 2 Q. And I'll admit to you, sir, that while you were
09:08:17 3 testifying, I put some brackets around some language. Do
09:08:20 4 you see that -- those brackets?

09:08:21 5 A. Yes.

09:08:21 6 Q. Can you read that to the jury, please, sir?

09:08:24 7 A. It says: You agree that you will sell us the submitted
09:08:28 8 patent for that amount with no additional consideration
09:08:31 9 beyond such amount required by us. Such purchase
09:08:35 10 contemplates the full and complete transfer of all right,
09:08:39 11 title, and interest in and to the submitted patents, by you
09:08:44 12 to us. You agree to be bound to the terms as indicated in
09:08:48 13 the patent purchase agreement linked to from this website,
09:08:55 14 insert URL here.

09:08:57 15 Q. Is that pretty clear to you, sir, that whoever read
09:08:59 16 this knew that they were selling their patent to Google?

09:09:02 17 A. Yes.

09:09:03 18 Q. And, indeed, sir, if we look at the second page of this
09:09:06 19 form, do you see down at the bottom where it says "click
09:09:13 20 here to accept"?

09:09:16 21 A. Yes.

09:09:16 22 Q. Is it your understanding that you had to click that
09:09:19 23 button, and that's what led to the word "accept" being
09:09:22 24 written in that form that we just looked at that was DTX-1?

09:09:24 25 A. Yes.

09:09:24 1 Q. So, in other words, your understanding is that Dr. Li
09:09:26 2 would have had to read this submission form, including
09:09:30 3 Paragraph 6, click accept, and then he would have submitted
09:09:34 4 his offer to Google?

09:09:35 5 A. That's my understanding.

09:09:36 6 Q. For 700,000, correct?

09:09:39 7 A. Correct.

09:09:39 8 Q. And what Google said in this document is, whatever you
09:09:42 9 tell us that you're going to sell it to us for, we consider
09:09:46 10 that binding, correct?

09:09:47 11 A. Yes.

09:09:52 12 MR. DACUS: That's all the questions I have,
09:09:55 13 Your Honor. I pass the witness.

09:09:56 14 THE COURT: Further cross-examination?

09:09:58 15 MR. LAMBRIANAKOS: Yes, Your Honor.

09:09:58 16 THE COURT: Please proceed.

09:09:58 17 RECROSS-EXAMINATION

09:10:18 18 BY MR. LAMBRIANAKOS:

09:10:18 19 Q. Mr. McGavock, you haven't seen a signed or approved
09:10:21 20 agreement for Mr. Li -- Dr. Li to sell his patent to
09:10:25 21 Google, have you?

09:10:25 22 A. No.

09:10:26 23 Q. You haven't brought a document here today that
09:10:28 24 indicates that the form that Mr. Dacus just showed you was
09:10:32 25 ever executed by Dr. Li?

09:10:35 1 A. It's my understanding that he accepted the terms
09:10:41 2 through the website.

09:10:43 3 Q. Did you show a document to the jury that shows that he
09:10:48 4 accepted any specific terms of an agreement with Google?

09:10:53 5 A. Not outside of what I just discussed.

09:10:56 6 Q. So what you just discussed was a form which was not
09:10:58 7 completed, correct?

09:11:00 8 A. Correct.

09:11:01 9 Q. Mr. Dacus showed you a form which had blank entries in
09:11:05 10 every single box, right?

09:11:07 11 A. Correct.

09:11:10 12 Q. And you have no proof that Dr. Li ever executed the
09:11:15 13 specific form that Mr. Dacus put in front of you?

09:11:18 14 A. I disagree. That -- that was the form that Google
09:11:21 15 used, and I have the accepted order -- Google form that I
09:11:27 16 was shown.

09:11:28 17 Q. Did Google present any evidence at trial as to the form
09:11:31 18 that it used at the particular time that Dr. Li executed
09:11:34 19 it?

09:11:36 20 A. It was public -- all publicly available.

09:11:40 21 MR. LAMBRIANAKOS: Move to strike that as not
09:11:43 22 responsive, Your Honor.

09:11:44 23 THE COURT: Sustained.

09:11:44 24 The question was: Did Google present any
09:11:49 25 evidence?

09:11:52 1 A. Specific to Dr. Li?

09:11:54 2 Q. (By Mr. Lambrianakos) Yes.

09:11:55 3 A. I -- I believe there was correspondence, yes.

09:12:02 4 Q. That correspondence was presented to the jury to
09:12:04 5 review; is that your testimony?

09:12:05 6 A. I believe there was a rejection of the offer.

09:12:10 7 Q. Was there any evidence that the specific form that
09:12:15 8 Mr. Dacus showed, which was not completed and had all of
09:12:18 9 its boxes and dots empty, was executed by Dr. Li?

09:12:22 10 A. Not outside of what we just talked about.

09:12:26 11 Q. Could you show us a signed form by Dr. Li that -- where
09:12:30 12 he signs and agrees to the terms that Mr. Dacus showed you?

09:12:33 13 A. No.

09:12:34 14 Q. Wouldn't you agree that if Dr. Li believed that Google
09:12:44 15 was infringing its patent and Google believed that it was
09:12:47 16 infringing Dr. Li's patent, that the offer would have been
09:12:52 17 much higher?

09:12:53 18 A. No.

09:12:54 19 Q. You think that the hypothetical negotiation that you're
09:12:57 20 applying this to would, in fact, not result in a higher
09:13:01 21 royalty if Dr. Li believed that Google was infringing?

09:13:08 22 A. At the -- the answer is no, and there's reasons.

09:13:12 23 Q. So you believe that whether or not there's infringement
09:13:14 24 is not relevant to your analysis of the hypothetical
09:13:18 25 negotiation for Google, correct?

09:13:19 1 A. No, I didn't say that.

09:13:21 2 Q. But you said that -- that if Google thought it was
09:13:24 3 infringing and Dr. Li thought that Google was infringing,
09:13:28 4 it would not upwardly adjust the -- the hypothetical
09:13:32 5 negotiation value of that offer, right?

09:13:33 6 A. No, in my opinion, it would not affect how reasonable
09:13:37 7 negotiators would look at that offer in the hypothetical
09:13:40 8 negotiation.

09:13:40 9 Q. Because the fact of infringement or non-infringement
09:13:43 10 wouldn't have been relevant to the -- the people that
09:13:45 11 you're talking about who would be analyzing it, right?

09:13:48 12 A. It could be relevant, but in this case, I don't think
09:13:51 13 it's relevant for adjusting the value.

09:13:55 14 MR. LAMBRIANAKOS: No further questions.

09:13:55 15 THE COURT: You pass the witness, counsel?

09:13:58 16 MR. LAMBRIANAKOS: Yes, Your Honor. Apologies.

09:14:00 17 THE COURT: Is there additional direct, Mr. Dacus?

09:14:03 18 MR. DACUS: Just one question, Your Honor.

09:14:07 19 THE COURT: I can count to one.

09:14:09 20 MR. DACUS: Yes, sir. I know you can.

09:14:11 21 May I have the ELMO, Ms. Lockhart?

09:14:11 22 REDIRECT EXAMINATION

09:14:15 23 BY MR. DACUS:

09:14:15 24 Q. I'm showing you, sir, what has been marked as DTX-41 in
09:14:19 25 the case. Is that the rejection letter from Google that

09:14:22 1 you were just referencing with Mr. Lambrianakos?

09:14:24 2 A. Yes.

09:14:27 3 MR. DACUS: That's all I have, Your Honor. I pass
09:14:29 4 the witness. Thank you.

09:14:30 5 THE COURT: Further cross-examination?

09:14:31 6 MR. LAMBRIANAKOS: Nothing further.

09:14:33 7 THE COURT: You may step -- step down,
09:14:35 8 Mr. McGavock.

09:14:40 9 Mr. Dacus, does Defendant wish this witness to be
09:14:42 10 excused?

09:14:43 11 MR. DACUS: If he -- if he can please be excused,
09:14:49 12 Your Honor.

09:14:49 13 THE COURT: Is there any objection from the
09:14:50 14 Plaintiff?

09:14:51 15 MR. LAMBRIANAKOS: No, Your Honor.

09:14:51 16 THE COURT: The witness is excused.

09:14:53 17 Defendants, call your next witness.

09:14:56 18 MR. DACUS: At this time, Your Honor, Amazon rests
09:14:58 19 its case.

09:14:59 20 THE COURT: All right. Ladies and gentlemen, the
09:15:01 21 Defendants have now rested their case-in-chief.

09:15:04 22 Does Plaintiff have a rebuttal case to put on or
09:15:07 23 rebuttal witnesses to call?

09:15:09 24 MR. LAMBRIANAKOS: Yes, Your Honor.

09:15:10 25 THE COURT: Let's proceed with the Plaintiff's

09:15:12 1 rebuttal case.

09:15:13 2 Plaintiff, call your first rebuttal witness.

09:15:15 3 MR. LAMBRIANAKOS: Plaintiff recalls Joseph
09:15:17 4 McAlexander.

09:15:17 5 THE COURT: All right. Mr. McAlexander, if you'll
09:15:22 6 return to the witness stand, sir. And let me remind you,
09:15:25 7 you remain under oath.

09:15:42 8 All right. Counsel, you may proceed.

09:15:47 9 MR. LAMBRIANAKOS: Thank you, Your Honor.

09:15:47 10 JOSEPH C. MCALEXANDER, III, PLAINTIFF'S WITNESS,

09:15:47 11 PREVIOUSLY SWORN

09:15:47 12 DIRECT EXAMINATION

09:15:47 13 BY MR. LAMBRIANAKOS:

09:15:47 14 Q. Good morning, Mr. McAlexander.

09:15:49 15 A. Good morning.

09:15:50 16 Q. Aside from offering your opinions on infringement in
09:15:54 17 this case, what else have you been asked to do?

09:15:55 18 A. I was asked also to offer opinions with regard to the
09:15:59 19 validity of Claims 1 and 8 of the '049 patent.

09:16:02 20 Q. Did you prepare any slides to assist you in presenting
09:16:07 21 your testimony to the jury?

09:16:08 22 A. Yes. Just like my presentation on Monday, I believe
09:16:11 23 some demonstratives will help move the matter along a bit.

09:16:18 24 MR. LAMBRIANAKOS: Next slide, please.

09:16:21 25 Q. (By Mr. Lambrianakos) What is your understanding

09:16:23 1 regarding the presumption of validity of a patent?

09:16:25 2 A. My understanding is that the '049 patent or any patent
09:16:30 3 is to be presumed valid.

09:16:32 4 Q. And what is your understanding of the burden of proof
09:16:37 5 in a case involving invalidity?

09:16:38 6 A. If there is any representation of the potential
09:16:45 7 invalidity of a patent, then the evidence that is there and
09:16:48 8 is presented must support what I understand to be the clear
09:16:51 9 and convincing evidence standard.

09:16:52 10 Q. How is Amazon challenging the asserted claims of the
09:16:57 11 '049 patent?

09:16:57 12 A. Well, there's several ways that invalidity can be
09:17:01 13 challenged. One is based upon anticipation. Another one
09:17:05 14 is based on obviousness.

09:17:06 15 My understanding and what I listened with the
09:17:09 16 testimony of Dr. Stern yesterday is that he does not argue
09:17:13 17 any -- any argument as far as prior art anticipating the
09:17:17 18 '049 patent, only obviousness.

09:17:18 19 Q. What do you regard as the major inventive features of
09:17:29 20 the '049 patent?

09:17:29 21 A. In looking at the patent, of course, the patent claim
09:17:34 22 as a whole is the invention. Claim 1 is an invention.
09:17:38 23 Claim 8 is an invention.

09:17:40 24 When I look at the construct of the claims, there
09:17:43 25 are at least several features that are new and not obvious.

09:17:47 1 The first, which I talked about on Monday, was
09:17:50 2 that it's new and inventive for including three specific
09:17:55 3 types of identified units or modules in a single digital
09:18:00 4 signal processor.

09:18:02 5 The particular modules that are claimed are the
09:18:05 6 sound source localization unit, the adaptive beamforming
09:18:08 7 unit, and the noise reduction unit.

09:18:13 8 And also with regard to the '049 patent, Claim 1,
09:18:16 9 I've also identified the enabling of the adaptive
09:18:22 10 beamforming for more than one configuration -- in other
09:18:24 11 words, a plurality of sensors.

09:18:27 12 MR. LAMBRIANAKOS: Next slide, please.

09:18:32 13 Q. (By Mr. Lambrianakos) What do you regard as the
09:18:34 14 inventive features of the -- of Claim 8 of the patent?

09:18:36 15 A. Claim 8, as you may recall, is a dependent claim. So
09:18:40 16 it requires all of the limitations of Claim 1. But Claim 8
09:18:43 17 adds one additional feature, and that is the subband
09:18:47 18 adaptive beamforming aspect.

09:18:49 19 MR. LAMBRIANAKOS: Next slide.

09:18:51 20 Q. (By Mr. Lambrianakos) Which claims are being
09:18:54 21 challenged by Amazon?

09:18:55 22 A. Claims 1 and Claim 8 are being challenged by Amazon.

09:19:01 23 Q. And which prior art references are being asserted by
09:19:04 24 Amazon?

09:19:04 25 A. In the demonstrative that I have in front of us now,

09:19:07 1 I've identified the art, the articles that I believe were
09:19:11 2 represented by Dr. Stern.

09:19:15 3 For Claim 1, he presented an obviousness argument
09:19:18 4 based upon the articles that are included in the
09:19:23 5 Burnstein -- Brandstein reference. He also included in the
09:19:26 6 combination of the articles in Brandstein with Dmochowski.
09:19:31 7 And for Claim 8, he utilized the same two articles,
09:19:35 8 Brandstein -- the articles within the textbook of
09:19:39 9 Brandstein and the article of Dmochowski with -- with a
09:19:46 10 third document which is identified as Abutalebi.

09:19:49 11 And then also with regard to Claim 1, there was at
09:19:51 12 least some representation of a combination of Brandstein
09:19:55 13 with Li.

09:19:56 14 Q. Does Amazon argue that any one reference anticipates
09:20:02 15 the claims of the '049 patent?

09:20:03 16 A. No, they do not argue any anticipation at all.

09:20:06 17 Q. Can you explain the difference between anticipation and
09:20:09 18 obviousness?

09:20:10 19 A. Yes. Generally, anticipation is that if you find a
09:20:17 20 particular single document or -- or product that
09:20:20 21 incorporates all of what's required by a claim, then that
09:20:23 22 document is said to anticipate the claimed invention.

09:20:28 23 Obviousness is not in one document itself, but
09:20:32 24 it -- it is a combination of documents that together show
09:20:37 25 the subject matter of the claim.

09:20:38 1 Q. What was the conclusion of your obviousness analysis?

09:20:42 2 A. My conclusion of the obviousness analysis that was
09:20:47 3 presented was that Claim 1 is valid and Claim 8 is valid.
09:20:53 4 Both claims of the '049 patent are valid.

09:20:55 5 MR. LAMBRIANAKOS: Next slide.

09:20:58 6 Q. (By Mr. Lambrianakos) What is shown in the highlighted
09:21:00 7 portions of this slide?

09:21:01 8 A. The highlighted portion of the slide identifies the
09:21:06 9 references that I'm going to discuss first, and these were
09:21:10 10 references that -- that were relied upon for potentially
09:21:17 11 allegedly rendering Claim 1 invalid based on obviousness,
09:21:21 12 and that was the Brandstein, and the combination of
09:21:28 13 Brandstein with Dmochowski.

09:21:28 14 Q. Were you here for Dr. Stern's testimony yesterday?

09:21:32 15 A. Yes, I was.

09:21:32 16 Q. What did he say about the Brandstein reference?

09:21:34 17 A. He indicated the Brandstein reference was -- was a
09:21:40 18 textbook, and it was a combination or a compilation of
09:21:44 19 different articles from -- and each one of the articles was
09:21:46 20 by a different set of authors, and they address different
09:21:50 21 subject matter.

09:21:50 22 Q. What did Dr. Stern conclude about whether the
09:21:57 23 Brandstein article or the Brandstein book discloses every
09:22:00 24 element of either Claim 1 or Claim 8?

09:22:02 25 A. My recall for -- from his testimony is Dr. Stern

09:22:07 1 indicated that the Bran -- Brandstein reference did not
09:22:11 2 include all of what is required by either Claim 1 or
09:22:14 3 Claim 8.

09:22:18 4 MR. LAMBRIANAKOS: Next slide.

09:22:21 5 Q. (By Mr. Lambrianakos) Do you believe the claims are
09:22:27 6 valid over the Brandstein combination?

09:22:29 7 A. Yes, I do.

09:22:31 8 Q. What are your reasons?

09:22:32 9 A. My reasons include at least the two points that I've
09:22:41 10 identified on this slide.

09:22:42 11 First, Dr. Stern, upon multiple questions,
09:22:49 12 represented that he concluded that none of the articles in
09:22:55 13 the Bran -- Brandstein reference combined, taught the
09:22:59 14 digital signal processor that included the sound source
09:23:02 15 localization unit, the adaptive beamforming unit, and the
09:23:06 16 noise proc -- noise reduction unit. So he admitted that
09:23:12 17 there was no finding of a DSP that is -- a digital signal
09:23:17 18 processor that is required by Claim 1 and Claim 8.

09:23:20 19 And, also, the -- the information with regard to
09:23:25 20 the sound sensors, the array of sound sensors in a
09:23:34 21 plurality of configurations, there was no evidence that
09:23:36 22 supported that.

09:23:41 23 MR. LAMBRIANAKOS: Next slide.

09:23:41 24 Q. (By Mr. Lambrianakos) Which portions of the Brandstein
09:23:42 25 textbook did you understand Dr. Stern to rely on for the

09:23:46 1 purposes of his obviousness analysis?

09:23:47 2 A. Well, I summarized on this particular demonstrative,
09:23:53 3 there were six references or articles within the Brandstein
09:23:55 4 textbook that Dr. Stern relied upon. And I've identified
09:24:01 5 those as Chapters 1, 2, 3, 5, 8, and 18. And you can see
09:24:08 6 that each one of those chapters are separate articles, and
09:24:11 7 they have separate topics.

09:24:13 8 For instance, the first one is constant
09:24:19 9 directivity beamforming, and that was authored by Ward.

09:24:21 10 The second is superdirective microphone arrays
09:24:25 11 authored by Bitzer.

09:24:27 12 Third article was post-filtering techniques
09:24:31 13 authored by Simmer.

09:24:32 14 The fourth was a robust adaptive beamforming
09:24:37 15 article authored by Hoshuyama.

09:24:42 16 The fifth was entitled Robust Localization in
09:24:50 17 Reverberant Rooms authored by DiBiase.

09:24:53 18 And the last was future programs in microphone
09:24:56 19 array processing by Campernelle.

09:25:01 20 Q. For invalidity purposes, did you find reasons to
09:25:02 21 combine or not to combine these references?

09:25:03 22 A. I found multiple reasons not to combine the references.
09:25:03 23 And my understanding is you have to have some reason to
09:25:08 24 look at disparate art and figure out a way in which it is
09:25:09 25 combined.

09:25:10 1 The combination has to be done through the eyes of
09:25:13 2 the ordinarily skilled artisan at the time of the
09:25:23 3 invention, which means that the person of skill in the art
09:25:25 4 at the time of the invention, which at this time was in the
09:25:28 5 year of 2010. The claim did not exist yet.

09:25:30 6 So the person who's looking for this art does not
09:25:32 7 know what the claim requires. It has to come from some
09:25:36 8 reason for this combination to be put together, in order to
09:25:42 9 come out with -- with what the claimed invention would
09:25:45 10 require when the claim was known.

09:25:46 11 So I'm looking for reasons. And what I do is I
09:25:49 12 look at, is there anything in the teaching or the
09:25:54 13 understanding of any one of these articles that causes me
09:25:58 14 to want to go look at and combine the other?

09:26:00 15 And the unfortunate thing for this is the answer
09:26:05 16 is no. Because many of these articles are directed to
09:26:08 17 theoretical concepts, they're experimentations. And, in
09:26:11 18 fact, there are numerous places within the articles that
09:26:13 19 state that -- that -- these are problems that they have
09:26:16 20 that they still don't have solutions for.

09:26:19 21 And I've represented on the right side of this
09:26:22 22 page some extracts that came out of, as I recall,
09:26:25 23 Chapters 17 and 18 of the -- of the Brandstein textbook.

09:26:34 24 And you'll note that within the text of these
09:26:37 25 particular articles, statements that I've highlighted,

09:26:40 1 number one, a simple example shows how this problem was
09:26:43 2 actually an extremely difficult one to solve.

09:26:46 3 Another one states: Admitted weaknesses to
09:26:50 4 proposed solutions are similar to the ones that we have
09:26:54 5 been struggling with for a long time. Generally speaking,
09:26:57 6 we may say that many proposed solutions add to our
09:26:59 7 understanding but lack of robustness in order to make a
09:27:02 8 bright future for themselves.

09:27:04 9 And the third one I've highlighted, states: The
09:27:10 10 problem is actually even worse. We have assumed that the
09:27:13 11 beamforming gain of the microphone array is optimum. For
09:27:16 12 an isotropic noise field, this gain is practically
09:27:20 13 impossible to realize for arrays greater than three
09:27:23 14 elements.

09:27:23 15 So when I go look at the construct of the articles
09:27:27 16 themselves, they're -- these are future. These are looking
09:27:30 17 at things that may happen, and recognizing a consistent
09:27:35 18 listing of problems that are there. Having problems that
09:27:39 19 you do not have solutions to, is very, very distinctly
09:27:42 20 different from having reasons to combine.

09:27:44 21 MR. LAMBRIANAKOS: Next slide, please.

09:27:48 22 Q. (By Mr. Lambrianakos) What did Dr. Stern conclude
09:27:50 23 regarding the digital signal processor limitation?

09:27:52 24 A. Dr. Stern testified yesterday that none of the
09:27:57 25 references that he relies on has the claimed digital signal

09:28:02 1 processor.

09:28:02 2 And in order to invalidate any one of these
09:28:05 3 claims, the documents have to -- have to cover the fact
09:28:09 4 that they do teach and have the digital signal processor.

09:28:11 5 Q. Do you agree with his admission on that?

09:28:14 6 A. I agree with his admission. None of the articles do
09:28:17 7 have and do show the digital signal processor with all
09:28:20 8 three units included.

09:28:22 9 MR. LAMBRIANAKOS: Next slide.

09:28:23 10 Q. (By Mr. Lambrianakos) So did Dr. Stern show that the
09:28:26 11 combination of references he relied on to meet the claimed
09:28:33 12 digital signal processor limitation do, in fact, disclose
09:28:35 13 the first element that you have analyzed here?

09:28:39 14 A. First element I've analyzed would be in agreement with
09:28:43 15 Dr. Stern that the digital signal processor limitation is
09:28:46 16 not found in any of the references in combination.

09:28:50 17 Q. What is the next limitation you wish to address?

09:28:53 18 A. That is the limitation of the -- it's directed to the
09:28:57 19 array of sound sensors in a plurality of configurations.

09:29:01 20 Q. What have you concluded about the obviousness
09:29:03 21 references that Dr. Stern identified to support his
09:29:07 22 assertion that this element is disclosed in the prior art?

09:29:11 23 A. Well, this is an example of what I addressed earlier,
09:29:14 24 when your -- you're combining things that do not work
09:29:21 25 together.

09:29:23 1 For instance, an article that is disclosed by
09:29:29 2 DiBiase in Chapter 8 contemplates a random distribution of
09:29:38 3 microphones.

09:29:38 4 If you look at the other paper that Dr. Stern
09:29:41 5 relies on, which is Chapter 2, this is on superdirective
09:29:45 6 microphone arrays. And, specifically, this one is directed
09:29:49 7 to supplying location parameters. It's hard to place
09:29:54 8 location parameters into something which is randomly
09:29:58 9 distributed. Those are not combinable.

09:30:01 10 This third item that I showed was Dmochowski,
09:30:03 11 which dealt with the circular array. Once again, when you
09:30:05 12 have a circular array, you have known criteria. You
09:30:05 13 don't have -- have known layout or geo -- geometric
09:30:14 14 positions. It's hard to combine that with something that's
09:30:17 15 randomly distributed.

09:30:18 16 So I see this concatenation of documents put
09:30:21 17 together, but they really are disparate documents, and
09:30:24 18 they're not combinable.

09:30:25 19 Q. So what is your conclusion regarding Claim 1 as to its
09:30:29 20 validity, based on a combination with the Brandstein
09:30:32 21 article and also the Brandstein articles with Dmochowski?

09:30:34 22 A. I find that this limitation is also missing from the
09:30:37 23 combination of articles.

09:30:39 24 MR. LAMBRIANAKOS: Next slide.

09:30:40 25 Q. (By Mr. Lambrianakos) Which combination of references

09:30:46 1 does Dr. Stern rely on to apply to Claim 8?

09:30:50 2 A. He relied on the same two documents, the Brandstein --
09:30:55 3 Brandstein collection of articles, the Dmochowski article.

09:30:59 4 And if we can go back to that slide.

09:31:01 5 And he also for Claim 8 relied on Abutalebi.

09:31:06 6 Q. What does Claim 8 require?

09:31:08 7 A. Claim 8 is directed to the com -- Claim 1 having all of
09:31:14 8 the -- all of what's required by Claim 1.

09:31:17 9 And it adds: Wherein said noise reduction unit
09:31:19 10 performs noise reduction in a plurality of frequency
09:31:23 11 subbands, wherein said frequency subbands are employed by
09:31:28 12 an analysis filterbank of said adaptive beamforming unit
09:31:32 13 for subband adaptive beamforming.

09:31:33 14 So what this adds is a limitation that's directed
09:31:36 15 to subband beamforming.

09:31:40 16 Q. What is your opinion regarding the validity of Claim 8?

09:31:43 17 A. My opinion is Claim 8 is valid.

09:31:49 18 Q. What does Dr. Stern say about the articles in the
09:31:53 19 Brandstein textbook?

09:31:54 20 A. Well, I identify first that, just as I mentioned
09:32:02 21 before, Dr. Stern admitted that none of the combination of
09:32:05 22 articles and papers and patents, none of them show the
09:32:08 23 three-unit digital signal processor that is required by
09:32:14 24 Claim 1.

09:32:14 25 Secondly, the combination with Abutalebi,

09:32:20 1 Abutalebi is only discussing noise cancellation, and it
09:32:25 2 does not describe any beamforming or localization. And
09:32:31 3 it's hard -- and no reason to combine.

09:32:33 4 And, also, when I look at -- at this combination
09:32:36 5 of references, it, to me, is -- it speaks of combining
09:32:41 6 references based on what I call 20/20 hindsight, which is
09:32:46 7 impermissible.

09:32:47 8 If you recall, I mentioned earlier that the
09:32:53 9 combination of references must be through the eyes of the
09:32:56 10 ordinarily skilled artisan at the time of the invention
09:33:00 11 before the claim even exists.

09:33:03 12 So what I discern from Dr. Stern's testimony when
09:33:08 13 he was asked about his process, he indicated he reviewed,
09:33:11 14 understood the patent, he had access to and looked at the
09:33:14 15 prosecution history, the file wrapper around the patent.
09:33:18 16 So he had knowledge of what the claim was.

09:33:20 17 What he did was, then he grabbed ahold of his
09:33:24 18 book, which he has on his desk, he held it up, the
09:33:28 19 Brandstein textbook, which an expert has. And so from his
09:33:33 20 expert opinion with knowledge of what the claim required,
09:33:39 21 he then went through and combined different articles from
09:33:43 22 the Brandstein reference and other papers and patents, to
09:33:46 23 come out with this -- with this representation.

09:33:48 24 Unfortunately, that's 20/20 hindsight. It's
09:33:54 25 impermissible. You have to, as an expert, take off the

09:33:56 1 robe of being an expert and look at this from the skilled
09:33:59 2 artisan's standpoint as of 2010.

09:34:02 3 And I do not believe he did that. And that's one
09:34:03 4 of the reasons that I represent that it's -- it was
09:34:07 5 combined based on impermissible hindsight.

09:34:12 6 Q. So what is your conclusion regarding the validity of
09:34:14 7 Claim 8?

09:34:15 8 A. I believe that none of the references that Dr. Stern
09:34:19 9 presented invalidate Claim 8. My -- my response is Claim 8
09:34:23 10 is valid.

09:34:23 11 Q. Does Dr. Stern argue that the Li article discloses the
09:34:32 12 elements of the -- of Claim 1?

09:34:34 13 A. No, he did not. I was here for his testimony
09:34:37 14 yesterday.

09:34:37 15 He made a passing reference of Li in combination
09:34:41 16 with Brandstein, but he provided no supporting evidence
09:34:44 17 that I saw in -- to render an opinion on that.

09:34:46 18 Q. So what is your ultimate conclusion regarding the
09:34:49 19 validity of Claims 1 and 8 of the '049 patent?

09:34:51 20 A. My ultimate conclusions, Claims 1 and 8 are valid.

09:34:58 21 Q. Now, with respect to secondary considerations of
09:35:02 22 non-obviousness, did you consider any of those?

09:35:04 23 A. Yes, sir, I did.

09:35:04 24 Q. Please tell the jury what secondary considerations of
09:35:07 25 non-obviousness are.

09:35:10 1 A. One of the criteria for a -- my understanding for a
09:35:13 2 proof of obviousness, is that when you combine articles and
09:35:19 3 papers for the -- for the purposes of an obviousness
09:35:22 4 argument, you should -- you must consider what's called
09:35:25 5 secondary considerations of non-obviousness.

09:35:27 6 Are there other factors that you can consider that
09:35:29 7 would say, look, these -- these are non-obvious? And there
09:35:34 8 are a number of different factors. I listed, as I recall,
09:35:38 9 10 in my expert report.

09:35:39 10 But there are several factors that -- that I
09:35:42 11 consider are important for consideration for an obviousness
09:35:45 12 evaluation.

09:35:46 13 Q. And which was the primary secondary consideration that
09:35:52 14 you felt was relevant to this?

09:35:53 15 A. Well, I noted several, one being commercial success.
09:35:57 16 The allege -- the products which I have identified on
09:36:01 17 Monday, the Echo products that infringe, clearly, they've
09:36:04 18 been commercially successful. And successful -- being
09:36:07 19 commercially successful is one of those factors for
09:36:11 20 consideration of non-obviousness.

09:36:14 21 Q. Did Dr. Stern consider any secondary considerations of
09:36:18 22 non-obviousness in his presentation?

09:36:20 23 A. Not that I recall, no.

09:36:21 24 Q. So what did you conclude at the end of your entire
09:36:25 25 analysis regarding the validity of the Claims 1 and 8 of

09:36:30 1 the '049 patent?

09:36:31 2 A. I conclude that Claims 1 and 8 are valid.

09:36:34 3 MR. LAMBRIANAKOS: Pass the witness, Your Honor.

09:36:35 4 THE COURT: Cross-examination?

09:36:36 5 MR. HADDEN: Yes, Your Honor.

09:36:45 6 MR. LAQUER: May I approach?

09:36:46 7 THE COURT: You may distribute binders.

09:37:19 8 All right. Mr. Hadden, you may proceed with
09:37:22 9 cross-examination.

09:37:22 10 MR. HADDEN: Thank you, Your Honor.

09:37:22 11 CROSS-EXAMINATION

09:37:24 12 BY MR. HADDEN:

09:37:24 13 Q. You agree that Dr. Stern is an expert in microphone
09:37:28 14 arrays, correct?

09:37:29 15 A. Yes, I believe he's been proffered and accepted by this
09:37:33 16 Court.

09:37:33 17 Q. And you agree that Dr. Stern is an expert in adaptive
09:37:37 18 beamforming, correct?

09:37:39 19 A. Yes.

09:37:39 20 Q. And you agree that Dr. Stern is an expert in sound
09:37:45 21 source localization, correct?

09:37:45 22 A. I believe that's correct, yes.

09:37:47 23 Q. And it's a fact that none of the prior art that

09:37:52 24 Dr. Stern discussed yesterday is considered by the Patent
09:37:57 25 Office when it allowed the '049 patent, correct?

09:38:02 1 A. I would agree that it's not considered, as you
09:38:07 2 understand. It was before the Patent Office. Several
09:38:10 3 were.

09:38:11 4 MR. HADDEN: Move to strike as non-responsive,
09:38:21 5 Your Honor.

09:38:21 6 THE COURT: The portion of the answer that says "I
09:38:23 7 would agree that it's not considered, as you understand" is
09:38:26 8 responsive. The remainder is non-responsive. I'll strike
09:38:30 9 the remainder of the answer.

09:38:32 10 MR. HADDEN: Thank you, Your Honor.

09:38:32 11 THE COURT: Let's proceed.

09:38:33 12 Q. (By Mr. Hadden) And it's a fact that the Brandstein
09:38:38 13 book was not considered by the Patent Office when it
09:38:41 14 allowed the '049 patent, correct?

09:38:42 15 A. I agree.

09:38:47 16 Q. And it's a fact that the Li article from 2009 was not
09:38:50 17 considered by the Patent Office when it allowed the '049
09:38:54 18 patent, correct?

09:38:54 19 A. Agree.

09:38:55 20 Q. And it's a fact that Dmochowski was not considered by
09:39:02 21 the Patent Office when it allowed the '049 patent, correct?

09:39:05 22 A. Agreed.

09:39:05 23 Q. And it's a fact that Abutalebi was not before and
09:39:11 24 considered by the Patent Office when it allowed the '049
09:39:13 25 patent, correct?

09:39:14 1 A. Agreed.

09:39:15 2 Q. And there was some testimony from Dr. Zhu regarding the
09:39:23 3 provisional application. Do you recall that testimony,
09:39:28 4 Mr. McAlexander?

09:39:28 5 A. Yes, I do.

09:39:29 6 Q. And a provisional application is called provisional
09:39:35 7 because it's a placeholder until the real application is
09:39:37 8 filed; isn't that correct?

09:39:39 9 A. Yes, that's correct.

09:39:39 10 Q. And the provisional application is not examined by the
09:39:44 11 Patent Office, correct?

09:39:45 12 A. That's correct, as I understand it.

09:39:47 13 Q. And it's only the real application that the applicant
09:39:51 14 files later that is examined by the Patent Office, right?

09:39:55 15 A. I believe that's correct, yes.

09:39:56 16 Q. And it's a fact that when Dr. Li filed his real
09:40:02 17 application, he removed any reference to the Brandstein
09:40:07 18 book; isn't that correct?

09:40:08 19 A. It was not present in the filed application.

09:40:16 20 Q. And you agree, don't you, Mr. McAlexander, that a
09:40:18 21 patent can be invalid because it's obvious, right?

09:40:20 22 A. It can be, yes.

09:40:23 23 MR. HADDEN: Can we see Paragraph 44 from
09:40:30 24 Mr. McAlexander's invalidity report?

09:40:31 25 Q. (By Mr. Hadden) And you prepared and provided a report

09:40:34 1 in this case that included all of your opinions regarding
09:40:37 2 validity, correct?

09:40:38 3 A. Correct.

09:40:38 4 Q. And if we look in your report here at Paragraph 44 --

09:40:42 5 MR. HADDEN: And can we highlight, Mr. Berk, the
09:40:44 6 sentence that begins "I understand"? It's the second
09:40:48 7 sentence -- I'm sorry, the next one. Oh, sorry, one more
09:40:57 8 down. I apologize. Next sentence.

09:41:00 9 THE COURT: There are about six sentences that
09:41:02 10 begin with "I understand."

09:41:03 11 MR. HADDEN: I know. I have realized that. Thank
09:41:09 12 you, Your Honor.

09:41:09 13 Q. (By Mr. Hadden) There's a sentence here where you
09:41:14 14 wrote in your report: I understand that the Supreme Court
09:41:16 15 specifically cautioned against granting patents that claim
09:41:19 16 nothing more than combinations of known elements driven by
09:41:25 17 non-innovative factors such as market demands.

09:41:28 18 Do you see that?

09:41:29 19 A. Yes, I do.

09:41:29 20 Q. And you put that statement in your report, correct?

09:41:32 21 A. Yes, I did.

09:41:33 22 Q. Okay.

09:41:33 23 MR. HADDEN: And if we go to the next sentence,
09:41:35 24 please, Mr. Berk.

09:41:43 25 Q. (By Mr. Hadden) In this sentence you wrote in your

09:41:45 1 report: I understand it also stressed the need for caution
09:41:50 2 before upholding the validity of patents that are merely
09:41:55 3 combinations of elements found in the prior art.

09:41:57 4 Do you see that?

09:41:58 5 A. Yes, I do.

09:41:59 6 Q. And the "it" in that statement is referring to the
09:42:03 7 Supreme Court of the United States, correct?

09:42:05 8 A. Yes, that's correct.

09:42:14 9 MR. HADDEN: Can we go to Paragraph 48, please,
09:42:17 10 Mr. Berk?

09:42:20 11 Q. (By Mr. Hadden) And this is also a paragraph from your
09:42:22 12 validity report in this case, correct?

09:42:25 13 A. Yes, that's correct.

09:42:26 14 Q. You state here: I understand that an obviousness
09:42:30 15 evaluation can also be based on a combination of multiple
09:42:38 16 prior art references.

09:42:39 17 Do you see that?

09:42:40 18 A. Yes, I do.

09:42:40 19 Q. And that's a true statement, isn't it?

09:42:43 20 A. Yes.

09:42:43 21 Q. And then you continue and say: The prior art
09:42:47 22 references themselves may provide a suggestion, motivation,
09:42:49 23 or reason to combine, but --

09:42:51 24 MR. HADDEN: Will you highlight the clause after
09:42:54 25 "but," please, Mr. Berk?

09:42:58 1 Q. (By Mr. Hadden) But other times the nexus linking two
09:43:01 2 or more prior art references is simple common sense.

09:43:04 3 Do you see that?

09:43:05 4 A. Yes, I do.

09:43:06 5 Q. And that's a true statement, too, isn't it,
09:43:11 6 Mr. McAlexander?

09:43:12 7 A. Yes.

09:43:13 8 Q. And let's go to Paragraph 52 of your report.

09:43:17 9 MR. HADDEN: Paragraph 52, please, Mr. Berk.

09:43:19 10 Thank you. If you go to the sentence that begins "I
09:43:28 11 further understand." It begins on the next page -- yeah,
09:43:59 12 can we get the last sentence there? Had the wrong
09:44:20 13 paragraph. There you go. Thank you. Thank you, Mr. Berk.
09:44:22 14 I found the right paragraph.

09:44:24 15 Q. (By Mr. Hadden) Do you see where -- this is, again, a
09:44:27 16 paragraph from your invalidity report, isn't it, sir?

09:44:29 17 A. Yes, that's correct.

09:44:30 18 Q. And here you state: I further understand that a
09:44:33 19 reference may be said to teach --

09:44:36 20 MR. HADDEN: No, wrong paragraph. Let's take that
09:44:40 21 down, Mr. Berk.

09:44:41 22 Can we put up Stern Demonstrative 6.26, please,
09:44:46 23 Mr. Berk?

09:45:25 24 Q. (By Mr. Hadden) You were here yesterday when Dr. Stern
09:45:27 25 testified, correct, Mr. McAlexander?

09:45:28 1 A. Yes, I was.

09:45:29 2 Q. And you heard his analysis where he went through the
09:45:32 3 Brandstein book and identified where all of these elements
09:45:37 4 of Claim 1 were described and taught. Do you recall that?

09:45:41 5 A. Yes, I do.

09:45:42 6 Q. And you don't dispute that the Brandstein book
09:45:49 7 describes and teaches sound source localization, do you?

09:45:51 8 A. There is an article on that, yes.

09:45:53 9 Q. And you don't dispute that the Brandstein book
09:45:58 10 describes adaptive beamforming, correct?

09:46:02 11 A. Yes, there's also articles on that.

09:46:04 12 Q. And you don't dispute that the Brandstein book
09:46:07 13 describes noise reduction, correct?

09:46:09 14 A. No, I don't dispute that either.

09:46:11 15 Q. And you also don't dispute that the Brandstein book
09:46:13 16 describes this receiving Step [B], correct?

09:46:19 17 A. No, I don't dispute that either.

09:46:21 18 Q. And you don't dispute that the Brandstein book
09:46:26 19 describes the determining a delay Step [C], correct?

09:46:29 20 A. Among the articles, I don't dispute that either.

09:46:32 21 Q. And you don't dispute that the Brandstein book
09:46:42 22 describes the estimating a spatial location, Element [D],
09:46:46 23 correct?

09:46:46 24 A. In one of the articles it does discuss that.

09:46:48 25 Q. And you don't dispute that the Brandstein book

09:46:54 1 describes Element [E], performing adaptive beamforming,
09:47:01 2 correct?

09:47:01 3 A. There are articles in that textbook that also discuss
09:47:06 4 adaptive beamforming.

09:47:06 5 Q. And you don't dispute that the Brandstein book
09:47:09 6 describes Element [F], suppressing said ambient noise
09:47:19 7 signals, correct?

09:47:20 8 A. There are articles on that, as well.

09:47:24 9 Q. Okay. And this book -- it is described in the book
09:47:27 10 itself --

09:47:27 11 MR. HADDEN: And if we can go to DTX-49.5, please,
09:47:31 12 Mr. Berk, and if we can blow up that first sentence.

09:47:44 13 Q. (By Mr. Hadden) Now, the Brandstein book itself
09:47:49 14 describes itself as a single complete reference of
09:47:53 15 microphone arrays, correct?

09:47:56 16 A. That is what it states, yes.

09:47:58 17 Q. Okay. And your dispute or your beef with this book is
09:48:02 18 that it has multiple chapters; isn't that right?

09:48:07 19 A. No.

09:48:07 20 Q. Your disagreement with Dr. Stern is whether or not this
09:48:15 21 book is a book, a single reference, or whether, you say,
09:48:21 22 it's a collection of disparate articles. Correct?

09:48:29 23 A. That -- my representation it is a book with disparate
09:48:36 24 articles, which is consistent with the obviousness position
09:48:38 25 of Dr. Stern.

09:48:39 1 Q. Now, if you -- this book has a table of contents,
09:48:45 2 doesn't it?

09:48:46 3 A. Yes, sir.

09:48:46 4 MR. HADDEN: Can we go to the table of contents of
09:48:51 5 Brandstein, please? And if we could blow it up. Can we
09:48:59 6 blow it up, Mr. Berk?

09:49:01 7 Q. (By Mr. Hadden) Now, the table of contents identifies
09:49:07 8 chapters and describes what the chapters cover, correct?

09:49:11 9 A. Yes, that's correct.

09:49:11 10 Q. So we have Chapter 1 on Constant Directivity
09:49:19 11 Beamforming; do you see that?

09:49:21 12 A. Yes, I do.

09:49:22 13 Q. It has chapters within that that explain the different
09:49:26 14 features and descriptions of that technology, correct?

09:49:29 15 A. Yes, that's correct.

09:49:29 16 Q. And then there's a next chapter that talks about
09:49:33 17 Superdirective Microphone Arrays. Do you see that?

09:49:38 18 A. Yes, I do.

09:49:38 19 Q. And it has subchapters that describe in detail where to
09:49:42 20 find information about the details of superdirective
09:49:44 21 microphone arrays, correct?

09:49:45 22 A. It has further details, yes.

09:49:47 23 Q. Okay. And is it your testimony that a person of
09:49:52 24 ordinary skill in the art wouldn't be able to read this
09:49:54 25 table of contents and find the information that Dr. Stern

09:50:03 1 provided to the jury yesterday?

09:50:05 2 A. I do not dispute that a person of skill in the art can
09:50:08 3 read a textbook, look at the table of contents, and
09:50:11 4 determine what is in that book, yes.

09:50:14 5 Q. Now, you don't dispute --

09:50:16 6 MR. HADDEN: And if we could go to Stern
09:50:31 7 Demonstrative 6.33, please.

09:50:33 8 Q. (By Mr. Hadden) Now, you don't dispute that Dmochowski
09:50:36 9 describes the determining a delay Limitation [C], as
09:50:39 10 explained by Dr. Stern yesterday, do you, Mr. McAlexander?

09:50:41 11 A. I don't dispute his representation. But, again, I'll
09:50:47 12 leave it at that.

09:50:47 13 MR. HADDEN: And if we can go to Stern
09:50:50 14 Demonstrative 6.47, please, Mr. Berk.

09:50:56 15 Q. (By Mr. Hadden) Now, you don't dispute that Abutalebi
09:51:00 16 discloses this additional requirement in Claim 8, as
09:51:05 17 explained by Dr. Stern yesterday, do you, Mr. McAlexander?

09:51:08 18 A. I don't dispute the representation of the Wiener
09:51:15 19 filter.

09:51:15 20 Q. Now, we talked some about digital signal processors,
09:51:21 21 correct?

09:51:21 22 A. Yes.

09:51:21 23 Q. Now, digital signal processors, or DSPs, have been
09:51:27 24 around for decades, haven't they, Mr. McAlexander?

09:51:29 25 A. Yes, digital signal processing has been around for

09:51:37 1 decades.

09:51:37 2 Q. And digital signal processors, as the name implies, are
09:51:43 3 processors -- processors that were developed and designed
09:51:46 4 to process digital signals quickly, correct?

09:51:49 5 A. I think your general characterization is partly
09:51:52 6 correct. Again, have to go by the Court's claim
09:51:54 7 construction for digital signal processor.

09:51:56 8 Q. And processing audio signals requires processing
09:52:05 9 digital signals in a way that needs to be done quickly;
09:52:09 10 isn't that correct, Mr. McAlexander?

09:52:11 11 A. State that again, please.

09:52:12 12 Q. When you're processing audio signals, it is useful to
09:52:18 13 process those digital signals quickly?

09:52:20 14 A. That can be one of the constructs.

09:52:23 15 MR. HADDEN: And could we see Stern
09:52:27 16 Demonstrative 6.6, please, Mr. Berk?

09:52:29 17 Q. (By Mr. Hadden) And it was known at the time, before
09:52:37 18 these patents -- in fact, this article from Computerworld,
09:52:41 19 that Dr. Stern talked about, is almost 10 years before
09:52:50 20 Dr. Li filed his patent application, right?

09:52:54 21 A. That's correct.

09:52:54 22 Q. And it was known at least 10 years before Dr. Li's
09:52:57 23 patent application, that DSPs -- or digital -- digital
09:53:00 24 signal processors, are widely used for processing audio;
09:53:00 25 isn't that right?

09:53:05 1 A. The general statement is correct, yes.

09:53:08 2 MR. HADDEN: And if we could now look at the
09:53:13 3 Court's claim construction, please, Mr. Berk, of digital
09:53:16 4 signal processor. Thank you.

09:53:25 5 Q. (By Mr. Hadden) So the Court, as you indicated, has
09:53:28 6 construed this term as: A microprocessor that is
09:53:31 7 specialized for mathematical processing of digital signals.

09:53:36 8 Do you see that?

09:53:36 9 A. Yes, I see that.

09:53:37 10 Q. Now, if a person of skill in the art, 10 years after
09:53:43 11 that Computerworld article that we just looked at, wanted
09:53:47 12 to process some digital signals mathematically, wouldn't it
09:53:50 13 make sense for them to use a microprocessor that is
09:53:53 14 specialized for that purpose?

09:53:55 15 A. Yes, I would agree with that.

09:53:56 16 Q. Okay. And when you are processing digital signals --
09:54:04 17 digital audio signals, wouldn't it be obvious for a person
09:54:07 18 of skill in the art to want to use a microprocessor that is
09:54:12 19 designed specifically for that purpose?

09:54:15 20 A. The general concept is correct, yes.

09:54:19 21 Q. Right. And isn't that exactly what Brandstein says?

09:54:23 22 MR. HADDEN: Can we look at DTX-49 at Page 392,
09:54:27 23 please, Mr. Berk?

09:54:36 24 THE TECHNICIAN: What page?

09:54:39 25 MR. HADDEN: I'm sorry. 0392, Mr. Berk. If we

09:54:50 1 could blow up the text that reads "today we have affordable
09:54:56 2 DSPs." Thank you. Right -- right there. Got it. Thank
09:55:17 3 you. Thank you, Mr. Berk.

09:55:18 4 Q. (By Mr. Hadden) Now, as Professor Stern indicated
09:55:22 5 yesterday, Brandstein book itself says: Today we have
09:55:30 6 affordable DSPs that allow us to implement all but the most
09:55:35 7 complex schemes cheaply in digital signal processing
09:55:39 8 technology in real-time.

09:55:41 9 Do you see that?

09:55:42 10 A. Yes, I see that.

09:55:43 11 Q. And just to be clear, the "today" that's referenced in
09:55:48 12 this book is 10 years before Dr. Li filed his patent
09:55:52 13 application, correct?

09:55:52 14 A. Yes, that's correct.

09:55:53 15 Q. So if 10 years before Dr. Li's patent application it
09:56:00 16 was known that DSPs would allow us to implement all but the
09:56:05 17 most complex schemes cheaply, wouldn't it have been even
09:56:09 18 more obvious 10 years later in 2010 to use a DSP to
09:56:14 19 implement these audio processing algorithms that are
09:56:18 20 described in Professor Brandstein's book?

09:56:21 21 A. No, not based upon all the words in that paragraph.

09:56:24 22 Q. Well, let's look at another example.

09:56:28 23 MR. HADDEN: Can we see DTX-33, please, Mr. Berk?
09:56:34 24 Can we blow up the system description?

09:56:38 25 Q. (By Mr. Hadden) So DTX-33 is that Li article from 2009

09:56:43 1 that was also not considered by the Patent Office, right?

09:56:46 2 A. Yes, that is correct.

09:56:47 3 Q. And, in this figure, it shows a DSP, right?

09:56:50 4 A. It does.

09:56:51 5 Q. And that DSP performs beamforming and noise reduction,
09:56:58 6 correct?

09:56:58 7 A. That's correct. Two of the three requirements.

09:57:00 8 Q. Right. And this was public information that was
09:57:04 9 published by Dr. Li and Manli Zhu before they filed -- more
09:57:10 10 than a year before they filed -- filed their patent,
09:57:13 11 correct?

09:57:13 12 A. That is correct.

09:57:14 13 Q. So it's your testimony -- and -- strike that.

09:57:18 14 Just to be clear, when we're talking about a DSP
09:57:22 15 that includes these different units, the beamforming, the
09:57:25 16 noise reduction, the sound source localization, what that
09:57:30 17 really means is that the software, the algorithms to
09:57:35 18 perform those various functions are being executed by a
09:57:38 19 processor that is designed to perform those types of
09:57:42 20 mathematical calculations. Correct?

09:57:45 21 A. That's correct. It's a combination of the software and
09:57:48 22 the hardware to perform that.

09:57:49 23 Q. So it's your testimony that even though Brandstein says
09:57:56 24 we have DSPs 10 years before the patent, and we should use
09:58:01 25 those to perform these types of algorithms, and Dr. Li in

09:58:07 1 his own published paper indicates using a DSP to do
09:58:10 2 beamforming and noise reduction, it's your conclusion that
09:58:14 3 it would not have been obvious to one of skill in the art
09:58:18 4 to use the same specialized processor to perform sound
09:58:26 5 source localization?

09:58:26 6 A. No, it's not mentioned in the Li article. It's not --
09:58:29 7 not shown in the Brandstein articles.

09:58:32 8 Q. But my question was, wouldn't it have been obvious to a
09:58:36 9 person who was designing this system knowing that all they
09:58:39 10 need is a processor that is specialized to perform the
09:58:43 11 types of calculations they're trying to perform, wouldn't
09:58:46 12 it be obvious to have all of the software, including the
09:58:53 13 sound source localizer, the beamformer, and the noise
09:58:59 14 reduction software, all be run on that specialized
09:59:00 15 software?

09:59:00 16 A. No, sir, that's not obvious.

09:59:02 17 Q. Okay.

09:59:03 18 MR. HADDEN: I pass the witness.

09:59:04 19 THE COURT: Redirect?

09:59:17 20 MR. LAMBRIANAKOS: Yes, Your Honor.

09:59:17 21 REDIRECT EXAMINATION

09:59:18 22 BY MR. LAMBRIANAKOS:

09:59:18 23 Q. Mr. Hadden was discussing the Brandstein book, right?

09:59:26 24 A. Yes.

09:59:27 25 Q. Was the Brandstein book authored by Mr. Brandstein?

09:59:32 1 A. No.

09:59:33 2 Q. Who were the authors of the Brandstein book?

09:59:36 3 A. Each one of the articles or chapters was authored by a
09:59:40 4 different author for different reasons. And what
09:59:43 5 Mr. Brandstein -- Dr. Brandstein did is he brought a
09:59:49 6 collection of these different articles and thoughts
09:59:50 7 together, many of which were experimental and many of which
09:59:53 8 were thoughts about what they could do in the future.

09:59:55 9 But even in the document that he just presented a
09:59:59 10 minute ago, he did not carry forward and show the rest of
10:00:02 11 it, which shows there was weaknesses. And these weaknesses
10:00:08 12 have been around for many years, and we still don't have
10:00:10 13 them solved.

10:00:11 14 Q. And you've opined that the DSP with the three units
10:00:17 15 that were discussed, is not disclosed or suggested anywhere
10:00:21 16 in the Brandstein book; is that right?

10:00:21 17 A. No, the -- the claimed digital signal processor use,
10:00:25 18 using the Court's construction, but requiring the unit --
10:00:29 19 the three units, the sound source localization, noise
10:00:31 20 reduction, and adaptive beamforming, does not appear and is
10:00:35 21 not suggested, not reasonably shown anywhere in the
10:00:39 22 Brandstein articles, and, in fact, is even missing eight
10:00:44 23 years later in the Li paper where he only had beamforming
10:00:48 24 and had noise reduction. But even their source -- sound
10:00:53 25 source localization was not part of what he was

10:00:55 1 representing.

10:00:55 2 Q. And what was Dr. Stern's opinion on that very issue?

10:00:57 3 A. Dr. Stern admitted yesterday that none of the

10:01:02 4 references he used had the claimed -- or showed the claimed

10:01:08 5 digital signal processor. And I agree with that statement,

10:01:11 6 agree with his testimony.

10:01:12 7 Q. Recall that Mr. Hadden showed you the -- the Brandstein

10:01:16 8 book, DTX-49?

10:01:18 9 A. Yes.

10:01:20 10 MR. LAMBRIANAKOS: Can we have DTX-49, please?

10:01:23 11 Can we go to Page 392 of the exhibit?

10:01:26 12 Q. (By Mr. Lambrianakos) This was the page that

10:01:28 13 Mr. Hadden showed you, right?

10:01:29 14 A. Yes, that's correct.

10:01:30 15 Q. And he -- he highlighted some language?

10:01:31 16 A. That is correct.

10:01:32 17 Q. And he -- he brought you to the sentence that said

10:01:37 18 "today we have affordable DSPs," et cetera?

10:01:41 19 A. Yes.

10:01:41 20 Q. And what does the next sentence say?

10:01:43 21 A. It says: But this in itself was not enough. And, in

10:01:51 22 fact, further down it says: Admitted weaknesses to

10:01:55 23 proposed solutions are similar to the ones that we have

10:01:58 24 been struggling with for a long time.

10:02:01 25 Q. And moving up the page a bit, what does the first

10:02:05 1 sentence of this paragraph tell you?

10:02:06 2 A. After 20 years of active research, however, we cannot
10:02:10 3 claim that microphone array processing has had the success
10:02:13 4 many of us hoped for, and many will wonder when the great
10:02:17 5 breakthrough in microphone array processing will finally
10:02:20 6 come, if ever.

10:02:22 7 MR. LAMBRIANAKOS: Pass the witness.

10:02:23 8 THE COURT: Further cross-examination?

10:02:29 9 MR. HADDEN: Just one question, Your Honor.

10:02:29 10 RECROSS-EXAMINATION

10:02:39 11 BY MR. HADDEN:

10:02:39 12 Q. That paragraph that we were just looking for was from
10:02:43 13 2001, right, Mr. McAlexander?

10:02:46 14 A. Yes. Yes, that's correct.

10:02:47 15 Q. And you mentioned some commercial success. It's a
10:02:53 16 fact, isn't it, Mr. McAlexander, that Professor Li has not
10:02:59 17 had any commercial success?

10:03:00 18 A. I would say that's correct. I didn't represent that.

10:03:06 19 MR. HADDEN: Thank you.

10:03:06 20 THE COURT: You pass the witness?

10:03:07 21 MR. HADDEN: Pass the witness. Sorry, Your Honor.

10:03:10 22 MR. LAMBRIANAKOS: Nothing further, Your Honor.

10:03:12 23 THE COURT: Any redirect?

10:03:13 24 MR. LAMBRIANAKOS: No, Your Honor.

10:03:13 25 THE COURT: All right. You may step down,

10:03:15 1 Mr. McAlexander.

10:03:16 2 THE WITNESS: Thank you, sir.

10:03:17 3 THE COURT: You're quite welcome.

10:03:19 4 Plaintiff, call your next rebuttal witness.

10:03:22 5 MR. LAMBRIANAKOS: No further witnesses,

10:03:23 6 Your Honor.

10:03:23 7 THE COURT: Does the Plaintiff rest its rebuttal

10:03:25 8 case?

10:03:26 9 MR. LAMBRIANAKOS: Yes, Your Honor, Plaintiff

10:03:27 10 rests.

10:03:27 11 THE COURT: All right. Ladies and gentlemen of

10:03:32 12 the jury, this means you have now heard all the evidence in

10:03:36 13 this case.

10:03:39 14 There are several things that the Court's required

10:03:41 15 to take up with counsel that will be taken up and

10:03:47 16 considered outside of your presence. It's a part of every

10:03:51 17 trial.

10:03:51 18 That means at 10:00 o'clock in the morning, I'm

10:03:55 19 about to release you for the rest of the day. And what you

10:03:59 20 do with the rest of the day is strictly up to you. But I

10:04:03 21 want you back tomorrow morning at 8:30, just as we did

10:04:06 22 today.

10:04:07 23 My -- my plan is that those matters that I'm

10:04:11 24 required under the rules of the Court to take up with

10:04:14 25 counsel can all be completed this afternoon. In fact, I

10:04:17 1 expect we'll probably be here close to the regular time
10:04:20 2 that we've recessed for the day during the trial.

10:04:23 3 But, nonetheless, it's my hope that those matters
10:04:26 4 can be completed so that in the morning when you return, I
10:04:32 5 can begin the day by giving you my final instructions on
10:04:35 6 the law that you're to apply in this case, followed by
10:04:39 7 closing arguments from the Plaintiff and the Defendants,
10:04:42 8 after which I will then instruct you to retire to the jury
10:04:45 9 room and deliberate on your verdict.

10:04:47 10 So that is what the schedule looks like it will
10:04:51 11 be. I'm going to ask you as you leave this morning, to
10:04:57 12 take your notebooks and leave them closed on the table in
10:04:59 13 the jury room.

10:05:01 14 I'm going to remind you, ladies and gentlemen, one
10:05:03 15 more time, do not discuss anything about this case with
10:05:07 16 anyone in any way. We are -- we are getting close to the
10:05:12 17 end. It would be an absolute travesty if any of you were
10:05:15 18 to violate my instructions and jeopardize everything that's
10:05:19 19 been done up until now.

10:05:22 20 So, please, follow all the instructions I've given
10:05:25 21 you about your conduct during the trial, including, of
10:05:28 22 course, not to discuss or communicate about the case with
10:05:30 23 anyone, including the eight of yourselves.

10:05:32 24 And with that, ladies and gentlemen, I will see
10:05:34 25 you in the morning. You're excused for the remainder of

10:05:36 1 the day.

10:05:37 2 COURT SECURITY OFFICER: All rise.

10:05:41 3 (Jury out.)

10:05:42 4 THE COURT: Please be seated.

10:06:03 5 Mr. McGavock, if you're going to remain in the
10:06:12 6 gallery, you need to wear a mask, sir. I sent somebody out
10:06:17 7 yesterday, so I'm trying to be consistent across the board
10:06:20 8 for everyone's well-being.

10:06:21 9 Also, Plaintiffs -- or, Plaintiff, I have seen and
10:06:30 10 heard no evidence on Claim 3. I assume you have
10:06:35 11 effectively dropped Claim 3 from your case, even though the
10:06:38 12 last filing on the record in this case indicates Claims 1,
10:06:44 13 3, and 8 would be the asserted claims for trial.

10:06:46 14 I need to clean up the record at this point. What
10:06:50 15 is Plaintiff's posture on Claim 3?

10:06:54 16 MR. FABRICANT: Yes, Your Honor. We had advised
10:06:56 17 defense counsel prior to the commencement of the trial, and
10:07:00 18 I believe we advised the Court, that Claim 3 would be
10:07:03 19 withdrawn and was not being asserted in this -- in this
10:07:05 20 case.

10:07:05 21 THE COURT: Well, if you advised the Court, the
10:07:09 22 message didn't get to me, and you certainly didn't do it in
10:07:12 23 writing. But we not have it on the record. And having
10:07:13 24 advised opposing counsel before the trial started that you
10:07:16 25 were dropping Claim 3, I'll consider that we've been to

10:07:20 1 trial on Claims 1 and 8 only and not Claim 3.

10:07:23 2 MR. FABRICANT: Yes, Your Honor.

10:07:24 3 THE COURT: Thank you.

10:07:24 4 Counsel, we're going to recess at this point until
10:07:44 5 12:00 noon. At noon, I will reconvene and take up any
10:07:48 6 motions under Rule 50(a) that either party cares to offer.

10:07:54 7 As I indicated yesterday, I will then proceed,
10:07:57 8 after that's completed, to hold an informal charge
10:08:00 9 conference, followed by a formal charge conference. And
10:08:03 10 we'll take all steps necessary this afternoon so that, as I
10:08:08 11 just told the jury, we can be prepared and ready to begin
10:08:10 12 tomorrow morning with my final instructions to the jury and
10:08:14 13 then your closing arguments.

10:08:15 14 As I mentioned yesterday, those of you that will
10:08:19 15 be involved in presenting closing arguments tomorrow are
10:08:22 16 not required to be present this afternoon, as long as those
10:08:25 17 issues are fully staffed by your trial teams.

10:08:28 18 Yesterday, we had a conversation in chambers with
10:08:41 19 regard to the Defendants' issue of inequitable conduct.
10:08:46 20 There has been some discussion back and forth since then,
10:08:51 21 none of it completely clear.

10:08:52 22 I'd like a recitation from both sides now as to
10:08:57 23 what you anticipate each side will be bringing forward with
10:09:00 24 regard to the inequitable conduct claim that will be
10:09:03 25 presented in a bench trial to the Court.

10:09:06 1 Let me hear from Defendant first.

10:09:09 2 MS. DOAN: Yes, Your Honor. May I take the
10:09:12 3 podium?

10:09:13 4 THE COURT: Please from the podium, Ms. Doan.

10:09:16 5 MS. DOAN: Your Honor, we'd like to have two -- we
10:09:19 6 advised the Plaintiff last night we have two witnesses.
10:09:22 7 We're crossing Dr. Peter Li briefly, and then we'd like to
10:09:28 8 present Mr. Nick Godici.

10:09:29 9 We do have deposition testimony from the
10:09:31 10 prosecuting attorney, Your Honor. We can play it for you,
10:09:35 11 if you wish, or we can submit it in writing. It's at the
10:09:37 12 Court's pleasure.

10:09:39 13 THE COURT: If you submit that testimony in
10:09:41 14 writing, what do you anticipate the length of your live
10:09:45 15 testimony to be?

10:09:46 16 MS. DOAN: We expect it to be approximately an
10:09:48 17 hour, Your Honor.

10:09:49 18 THE COURT: All right. In light of that, what can
10:09:52 19 I expect from the Plaintiff with regard to the inequitable
10:09:54 20 conduct issue? Obviously, the Court's trying to determine
10:09:56 21 when and how to schedule this.

10:09:58 22 MR. FABRICANT: Well, it's obviously the
10:10:00 23 Defendants' burden by clear and convincing evidence, so
10:10:04 24 some of our projection will depend on the presentation
10:10:06 25 that's made. It might go anywhere from no defense at all,

10:10:10 1 depending on the presentation and the strength of the
10:10:13 2 presentation, to I would estimate cross-examining Dr. Li,
10:10:19 3 if he's presented by the defense as a witness,
10:10:22 4 cross-examining the patent law expert for a brief period of
10:10:25 5 time. We would also like counter-designate -- we'd like
10:10:28 6 the ability, obviously, to make counter-designations to the
10:10:33 7 submitted deposition testimony.

10:10:33 8 If the Plaintiff -- if the Defense's
10:10:36 9 presentation -- live presentation is approximately an hour,
10:10:39 10 as -- as we have been advised, then I would expect ours
10:10:43 11 would be no more than approximately 30 to 40 minutes,
10:10:47 12 Your Honor.

10:10:47 13 THE COURT: All right. Well, I see no reason to
10:10:50 14 play the deposition testimony to me. I think the Court can
10:10:53 15 adequately review the transcripts or the portions of the
10:10:56 16 transcripts that the parties wish to offer.

10:10:59 17 So with regard to any deposition witnesses, I'll
10:11:01 18 take submissions and counter-submissions from the
10:11:05 19 transcripts from the parties. And we'll limit the actual
10:11:10 20 live presentation to Dr. Li and the expert -- I've
10:11:16 21 forgotten his name.

10:11:18 22 MS. DOAN: Nicholas Godici, Your Honor.

10:11:20 23 THE COURT: Mr. Godici.

10:11:21 24 With that, counsel, I would anticipate that with
10:11:27 25 my final instructions and closing, the case will get to the

10:11:31 1 jury sometime before, but probably not a great deal before,
10:11:36 2 lunch tomorrow.

10:11:38 3 And with that in mind, it would be my plan, as I
10:11:41 4 sit here now -- subject to change, but as I sit here now,
10:11:45 5 it would be my plan after the lunch break tomorrow to put
10:11:47 6 on the inequitable conduct portion of the trial as a bench
10:11:51 7 trial.

10:11:51 8 MS. DOAN: Yes, Your Honor.

10:11:53 9 THE COURT: All right. So prepare your -- prepare
10:11:54 10 yourselves accordingly.

10:11:56 11 MS. DOAN: We will, Your Honor.

10:11:57 12 One further clarification. Would you like -- some
10:12:00 13 of the trial testimony that's been offered this week also
10:12:03 14 affects the inequitable conduct trial portion, as well.
10:12:06 15 Would you like us to submit that portion in writing or --

10:12:09 16 THE COURT: I've certainly heard it and been
10:12:13 17 exposed to it throughout the trial. I would simply suggest
10:12:15 18 you reference that in your argument. There'll be a final
10:12:19 19 argument at the end of the --

10:12:21 20 MS. DOAN: Yes, Your Honor.

10:12:22 21 THE COURT: -- inequitable conduct. If there's
10:12:25 22 something in your argument that I think the Court would
10:12:29 23 benefit from by having it submitted in writing, as opposed
10:12:29 24 to just refreshing the Court's recollection about what was
10:12:33 25 said during the jury trial, I'll ask for it.

10:12:35 1 MS. DOAN: Thank you, Your Honor.

10:12:36 2 MR. FABRICANT: Your Honor, do the Court's
10:12:39 3 purported rules with respect to the exchange of exhibits
10:12:43 4 and demonstratives apply?

10:12:45 5 THE COURT: Absolutely. I don't want any
10:12:47 6 surprises tomorrow.

10:12:48 7 MR. FABRICANT: Thank you.

10:12:48 8 THE COURT: All right. Is there anything further
10:12:50 9 from either Plaintiff or Defendant before we recess for
10:12:53 10 lunch?

10:12:53 11 MR. FABRICANT: Nothing from the Plaintiff.

10:12:55 12 MR. DACUS: Nothing from Amazon, Judge.

10:12:59 13 THE COURT: We stand in recess until noon.

10:13:02 14 COURT SECURITY OFFICER: All rise.

15 (Recess.)

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/2020

10/7/2020
Date